

IMAGED

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COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA-09-10-263

vs.

HONORABLE ANDREW NASTOFF

HONORABLE KEITH SPAETH

HONORABLE CHARLES PATER

VON CLARK DAVIS,

Defendant.

FILED BUTLER CO.  
COURT OF APPEALS

JAN 08 2013

ORIGINAL

GINDY CARPENTER  
CLERK OF COURT

MITIGATION HEARING

TRANSCRIPT OF PROCEEDINGS

September 8, 2009

VOLUME I

JILL M. CUTTER, RPR  
(513) 785-6596

1 APPEARANCES:

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and

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On behalf of the defendant:

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TRANSCRIPT OF PROCEEDINGSTuesday, September 8, 2009

- - - - -

JUDGE NASTOFF: We are on record in State of Ohio vs. Von Clark Davis. This is CR1983-12-0614. For the record, present in court is the defendant, Von Clark Davis appearing personally. He is accompanied by his counsel, Randall Porter.

MR. PORTER: Good morning, Your Honor.

JUDGE NASTOFF: And Melynda Cook-Reich. Good morning to you.

MS. COOK-REICH: Good morning, Your Honor.

JUDGE NASTOFF: Present on behalf of the State are assistant prosecutors Dan Eichel.

MR. EICHEL: Good morning, Your Honor.

JUDGE NASTOFF: And Michael Oster.

MR. OSTER: Good morning, Your Honor.

JUDGE NASTOFF: This case is before the Court pursuant to an order granting conditional writ of habeas corpus issued by US District Court Judge James Graham of the Southern District of Ohio, in which he ordered the State of Ohio to grant Mr. Davis a new sentencing hearing. The original three-judge panel that heard the original trial in 1984, and heard the first resentencing hearing in 1989 consisted of Judges

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1 Brewer, Stitsinger and Moser. Since none of those 10:27:30  
2 three judges were still on the bench when this case was 10:27:35  
3 sent back, a new three-judge panel has been selected 10:27:38  
4 pursuant to Ohio Revised Code 2929.06 (B) and by random 10:27:43  
5 draw as to the remaining judges on the panel. 10:27:49

6 Also I would note for the record, that pursuant to 10:27:52  
7 Criminal Rule 25 (B) the new panel is to be appointed 10:27:55  
8 by administrative judge. The administrative judge for 10:27:59  
9 our court is Judge Michael Sage. Since he was a member 10:28:03  
10 of the prosecution team in the original trial of this 10:28:06  
11 action, he recused himself from any even ministerial 10:28:10  
12 activity involved in this case. Judge Patricia Oney 10:28:18  
13 was appointed acting administrative judge and signed an 10:28:21  
14 entry appointing myself, Andrew Nastoff, as the 10:28:24  
15 presiding judge of this panel, and Judges Keith Spaeth 10:28:28  
16 and Charles Pater have been appointed as the remaining 10:28:31  
17 two judges consistent with that random draw earlier. 10:28:34

18 As set forth in Ohio Revised Code 2929.06 (B), 10:28:38  
19 this panel is directed to follow the procedures set 10:28:42  
20 forth in Division D of Ohio Revised Code 2929.03 and is 10:28:45  
21 to apply the version of that statute in effect at the 10:28:50  
22 time of the offense. Accordingly, this panel takes 10:28:53  
23 note that the defendant, Von Clark Davis, has been 10:28:58  
24 convicted of aggravated murder in violation of Ohio 10:29:02  
25 Revised Code 2903.01 (A). And further has been found 10:29:05

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1 guilty beyond a reasonable doubt of the aggravating  
2 circumstance of having been convicted of an offense, an  
3 essential element of which was the purposeful killing  
4 of another prior to the offense at bar in violation of  
5 ORC 2929.04(A)5.

6 Now, pursuant to 2929.03(D)(1) this panel stands  
7 ready to consider, at this new sentencing hearing, any  
8 report prepared pursuant to that section, any evidence  
9 raised at trial that is relevant to the aggravating  
10 circumstance the offender was found guilty of  
11 committing, or to any factors in mitigation of the  
12 imposition of the sentence of death, to hear testimony  
13 and other evidence that is relevant to the nature and  
14 circumstances of the aggravating circumstance the  
15 offender was found guilty of committing, the mitigating  
16 factors set forth in Division B of Section 2929.04, and  
17 any other factors in mitigation of the imposition of  
18 the sentence of death. And to hear the statement, if  
19 any, of the offender, and the arguments, if any, of  
20 counsel for the defense and prosecution that are  
21 relevant to the penalty should it be imposed on the  
22 offender.

23 With that being said, are there any matters that  
24 we need to take up as we begin this process? Counsel?

25 MS. COOK-REICH: Your Honor, we have the pending

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1 motion in limine that we have had several filings on 10:30:42  
2 relative to asking for a prior hearing on the matter of 10:30:45  
3 relevancy of witnesses and evidence we expect the 10:30:49  
4 prosecutor to call. 10:32:43

5 JUDGE NASTOFF: All right. All right. Also, just 10:32:43  
6 so the record is clear, not only have Judges Spaeth and 10:32:43  
7 Pater been appointed on this panel, they are present in 10:32:43  
8 court as a part of this panel as we proceed. 10:32:43

9 There has been a motion in limine filed, it was 10:32:43  
10 dated May 8, 2009, wherein the defense seeks to limit 10:32:44  
11 -- seeks an order limiting the prosecutor as to the 10:32:44  
12 evidence of the prior 1971 murder conviction that can 10:32:44  
13 be presented in this mitigation phase, or the 10:32:44  
14 sentencing phase of the trial. They ask for an order 10:32:44  
15 that the State of Ohio only be allowed to submit the 10:32:44  
16 judgment entry of conviction and not additional 10:32:44  
17 evidence. 10:32:44

18 Was there anything above and beyond what you 10:32:44  
19 submitted in your written argumentation that you wish 10:32:44  
20 to present to the panel on that issue? 10:32:44

21 MS. COOK-REICH: The only other thing that we did 10:32:44  
22 not include in that written motion on May 8th, was the 10:32:45  
23 copy of the Bill of Particulars, which we have located 10:32:45  
24 in the case file. And I can certainly submit to the 10:32:45  
25 Court, I assume you have it in your trial notebooks as 10:32:45

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1 part of the case, but it specifically states, and I  
2 will quote, that prior to the said aggravated murder  
3 committed by the defendant, Von Clark Davis, the  
4 defendant was convicted on April 20, 1971, of murder in  
5 the second degree, an essential element of which was  
6 the purposeful killing of another, to wit: Ernestine  
7 Davis, contrary to section 2901.05 of the Ohio Revised  
8 Code in the Court of Common Pleas of Butler County,  
9 Ohio, in case number, 21655 as specified in section  
10 2929.04 (A)(5) of the Ohio Revised Code.

11 It basically tracks the language of the indictment  
12 adding in specifically the name of Ernestine Davis, but  
13 did not provide any additional information. And we  
14 would argue that simply the judgment conviction entry  
15 is the only thing relevant to this proceeding, it  
16 should be the only thing that the State is allowed to  
17 present. I know in a prior case in Warren County,  
18 where the specification was an (A)(5) specification,  
19 State vs. Rocky Bartin, the State in that case, Warren  
20 County prosecutor submitted only the judgment  
21 conviction entry and the guilty plea in that case as  
22 part of its case for the mitigation and nothing else.  
23 And we would argue that to allow additional information  
24 to be presented in this Court, beyond the specification  
25 that has already been proven and found by the prior

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1 three-judge panel, would again be allowing admission of  
2 non-statutory aggravating circumstances for which the  
3 Ohio Supreme Court returned this case back to this  
4 Court in 1988.

5 JUDGE NASTOFF: All right. And again, before I  
6 turn to the State for any response, does the State have  
7 any -- or pardon me, does the defense have any  
8 authority, case law from the 12th District and other  
9 appellate district, the Supreme Court if it is newer  
10 case law, or federal case law, interpreting Ohio's  
11 sentencing scheme which addresses the specific issue  
12 that you are talking about with an (A)(5)  
13 specification?

14 MS. COOK-REICH: Your Honor, we have cited in our  
15 memorandum, Werkman vs. Bell, 160 F3d. 276, Sixth  
16 Circuit decision in 1993.

17 THE COURT: All right. And do you have and --

18 MS. COOK-REICH: I think the statutes are pretty  
19 clear also in looking at the specifications statute  
20 2929.04(A)(5) as well as if you look specifically at  
21 the decision by the Supreme Court in this case, State  
22 v. Davis, 38 Ohio Supreme Court 3d. at pages 368, 369  
23 and this was in the Supreme Court's decision talking  
24 about the admission -- I'm sorry, the written decision  
25 by the panel relative to the aggravating circumstances

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1 and mitigating factors that they considered, and their  
2 language specifically is, of those circumstances  
3 enumerated in the statute, and they are speaking of the  
4 statute 2929.04 (A), only the aggravating circumstance  
5 described in RC 2929.04 (A)(5) is present in the trial  
6 court's opinion. Item 4 finds the, and then there's a  
7 quotation mark, prior purposeful killing of his wife in  
8 1970, end of quotation mark, to be an aggravating  
9 circumstance.

10 That decision I think is controlling in this case,  
11 indicating that that circumstance has already been  
12 proven and that is an aggravating circumstance that is  
13 a statutory aggravating circumstance that was allowed  
14 to be presented.

15 JUDGE NASTOFF: All right. Do you have an extra  
16 copy of Werkman vs. Bell that you can provide?

17 MS. COOK-REICH: I do not, Your Honor. It is a  
18 reported case. I can certainly go to the law library  
19 at break and --

20 JUDGE PATER: And what is the substance of it?  
21 What was the background? What was the holding in that  
22 case?

23 MS. COOK-REICH: The holding in that case, Your  
24 Honor, is that relative to the non-statutory  
25 aggravating circumstances, admission of such

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1 non-statutory aggravating circumstances would result in 10:36:14  
2 an unconstitutional trial and we would submit that to 10:36:16  
3 allow evidence going to non-statutory aggravating 10:36:20  
4 circumstances, would make this yet again the third 10:36:23  
5 unconstitutional trial that this case would be visiting 10:36:26  
6 and you will see this case again in ten more years back 10:36:29  
7 on that one factor which the Ohio Supreme Court already 10:36:32  
8 told you in 1988 could not be used. 10:36:36

9 JUDGE NASTOFF: But in Werkman vs. Bell does that 10:36:38  
10 deal with an (A)(5) aggravating -- 10:36:41

11 MS. COOK-REICH: It's a Tennessee case. I didn't 10:36:44  
12 think it was a State of Ohio case either, Your Honor. 10:36:47

13 JUDGE NASTOFF: Okay. All right. 10:36:49

14 JUDGE PATER: If I could interpose something here. 10:36:50  
15 I don't think there is any question in this room among 10:36:53  
16 anybody who has looked into these things whatsoever 10:36:57  
17 that there in this case is one aggravating 10:36:58  
18 circumstance. And that aggravating circumstance is 10:37:00  
19 that in 1971 the defendant was found guilty of a crime 10:37:03  
20 that involved the purposeful killing of another. There 10:37:07  
21 is no question about that. 10:37:11

22 This Court, I can tell you for all three of us, we 10:37:12  
23 are not going to take into consideration any other 10:37:16  
24 aggravating circumstance other than that. But that is 10:37:20  
25 not the issue. That is not the problem. 10:37:21

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1           You spoke a minute ago about the statutes being 10:37:25  
2           relatively clear. And I agree, but I agree from the 10:37:27  
3           opposite perspective. If you look at the version of 10:37:31  
4           2929.03 (D)(1) that existed at 1983, at the time of the 10:37:36  
5           commission of this crime, it states as follows: And 10:37:45  
6           this is the -- this is (D)(1), there are two paragraphs 10:37:49  
7           within (D)(1). The first paragraph is very long. 10:37:54  
8           About half of the way through that paragraph, I am 10:37:57  
9           going to quote in part, the Court shall hear testimony 10:38:01  
10          and other evidence that is relevant to the nature and 10:38:09  
11          circumstances of the aggravating circumstance. 10:38:16

12           The statute very clearly says that this Court is 10:38:23  
13          going to hear testimony and evidence that is relevant 10:38:27  
14          in our particular case to the nature and circumstances 10:38:34  
15          of the first murder. How else can you interpret that? 10:38:37  
16          And it seems when you go through the State Supreme 10:38:44  
17          Court's decisions in recent years, especially Gumm, 10:38:48  
18          Wogenstahl and Newton, you find the Supreme Court 10:38:52  
19          saying very clearly, I think, that just what the 10:38:55  
20          statute says, that the Court shall hear those things. 10:39:00

21           The Court certainly doesn't talk about any status 10:39:06  
22          offenses, doesn't use that kind of terminology 10:39:09  
23          whatsoever. The Supreme Court, our Supreme Court says 10:39:12  
24          we shall hear these things, and even go beyond that and 10:39:16  
25          saying it is ludicrous to interpret this statute in 10:39:20

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1 such a way as to say that the Court will only take 10:39:24  
2 cognizance of the fact that there was a previous 10:39:28  
3 conviction or the fact that a person was in detention 10:39:32  
4 when the person committed the murder at question in the 10:39:36  
5 current case. 10:39:41

6 The Court says it is ludicrous just to look at 10:39:42  
7 that abstractly. In the Newton case especially, you've 10:39:45  
8 got a what might be called by some a status type of an 10:39:49  
9 offense whereby the aggravating circumstance is merely 10:39:53  
10 that a person was in detention. The Court goes at 10:39:57  
11 quite a length to describe how that is not enough in 10:40:02  
12 and of itself just to say that the defendant was in 10:40:07  
13 detention when he committed the murder. So that is 10:40:12  
14 what is puzzling me in the defense's motion here. How 10:40:14  
15 do you respond to Gumm, wogenstahl and Newton? How do 10:40:18  
16 you respond to the clear wording of 2929.03 (D)(1)? 10:40:22  
17 That is -- that is the problem that I have with 10:40:27  
18 defense's position here. Can you respond to that? 10:40:30

19 MS. COOK-REICH: I respond exactly how I already 10:40:32  
20 did. The Ohio Supreme Court already said what is the 10:40:34  
21 factor that can be considered in this case, and they 10:40:38  
22 did that in the 1988 decision that I am assuming you 10:40:40  
23 have a copy of in your trial notebook. 10:40:43

24 JUDGE NASTOFF: We do. 10:40:46

25 JUDGE PATER: But I think you are missing my 10:40:46

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1 point. There is one aggravating circumstance. The one  
2 aggravating circumstance is that the defendant here  
3 committed a prior murder. Purposeful killing of  
4 another human being, but the statute says that we are  
5 to hear testimony and evidence concerning the nature  
6 and circumstances of that aggravating circumstance. So  
7 what -- I mean that seems to be clear. I guess it is  
8 not to everybody, Mr. Porter.

9 MR. PORTER: If I could respond.

10 JUDGE PATER: Please, I am waiting for a response.

11 MR. PORTER: And I certainly don't mean to double  
12 team you with --

13 JUDGE PATER: No, no, feel free.

14 MR. PORTER: I think the aggravator in this case,  
15 Your Honor, is the conviction. That is it. The  
16 testimony you can take as to the conviction I think  
17 you're limited as -- and since it has already been  
18 stipulated so that this conviction has already been  
19 proven, is the testimony I think are limited. If the  
20 Court wants to take testimony and the prosecutor wants  
21 to present testimony is bring in the clerk to show the  
22 certified copy, to bring someone in to say, and we have  
23 stipulated this so there is no necessity to do it, but  
24 I think if the prosecutor wants to present testimony it  
25 is that Von is, in fact, the one that was convicted.

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1 The -- and I am being repetitious and I don't mean to 10:42:17  
2 be. 10:42:22

3 JUDGE PATER: Please do, because I need 10:42:23  
4 clarification. 10:42:25

5 MR. PORTER: The specification is not that he 10:42:26  
6 committed the murder. The specification is simply that 10:42:28  
7 he was convicted of the murder. And the only testimony 10:42:30  
8 you can take is with respect to the conviction and not 10:42:33  
9 the commission of the murder, and the prosecutor, in 10:42:37  
10 fact, wants to present evidence as to the commission 10:42:40  
11 rather than the conviction. 10:42:43

12 JUDGE PATER: Okay. That helps me to see the 10:42:46  
13 defense's position. So it is the conviction and not 10:42:48  
14 the commission of the first murder? 10:42:51

15 MR. PORTER: Exactly, Your Honor. 10:42:54

16 JUDGE PATER: All right. Thank you. 10:42:56

17 JUDGE NASTOFF: Any response from the State? 10:42:57

18 MR. EICHEL: Your Honor, please, we again, not to 10:42:58  
19 reiterate Judge Pater's argument, but we believe this 10:43:04  
20 statute is clear. It was clear the first time this 10:43:10  
21 case was tried. And that Court hearing testimony by an 10:43:14  
22 officer involved in the first case in the 1971 10:43:20  
23 conviction, gave testimony over objection, this issue 10:43:26  
24 could have been, but was not raised in the appeals that 10:43:32  
25 followed. We basically have the law of the case 10:43:36

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1 applying here, not only that, it was clear language 10:43:41  
2 that applied then and applies now. 10:43:45

3 We are to consider the nature and circumstances of 10:43:47  
4 the aggravating circumstance. And the nature and 10:43:50  
5 circumstances point not to a court proceeding in which 10:43:54  
6 a person was convicted, they point to the aggravating 10:43:58  
7 circumstance, the substance of which was the defendant 10:44:03  
8 was convicted of causing the purposeful killing of 10:44:09  
9 another, his wife Ernestine Davis. We believe that in 10:44:12  
10 the first trial, this was pointed out. The panel 10:44:19  
11 overruled that objection. And the law was then as it 10:44:22  
12 is now, it has been subsequently added, State Supreme 10:44:27  
13 Court has decided Gumm and Wogenstahl and Nelson, among 10:44:33  
14 many other cases to justify the position we take that 10:44:39  
15 the nature and circum -- testimony and other evidence 10:44:44  
16 pertaining to the nature and circumstances of the 10:44:49  
17 aggravating circumstance is admissible, is literally 10:44:52  
18 admissible under this statute. 10:44:56

19 JUDGE NASTOFF: Mr. Eichel, I think one thing that 10:45:00  
20 -- and both of you feel free to address this, that 10:45:04  
21 causes this Court to take some pause is that Gumm, 10:45:07  
22 Wogenstahl, the Newton case, many of the cases that 10:45:15  
23 address this issue are not (A)(5) specifications. They 10:45:19  
24 are felony murder. They are murder while under 10:45:27  
25 detention. They are specifications that are fact 10:45:31

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1 driven, that deal with facts that surround the 10:45:36  
2 aggravated murder that the person is convicted of, that 10:45:44  
3 it was during the commission of the kidnapping, for 10:45:46  
4 example, or while under detention perhaps with Newton, 10:45:49  
5 and there is at least an argument that in (A)(5) is a 10:45:52  
6 different creature, arguably that is why I am asking 10:46:00  
7 you to address this, and that it has nothing to do with 10:46:04  
8 the -- it's not intertwined at all with the facts of 10:46:07  
9 the murder that brings us to this proceeding. The '83 10:46:11  
10 killing. Okay. It describes something that occurred 10:46:17  
11 well prior to that by its very definition, prior to the 10:46:24  
12 offense at bar. And so I believe the defense is 10:46:27  
13 arguing that it is different in its nature and so, you 10:46:31  
14 know, the nature and circumstances that would describe 10:46:34  
15 in (A)(5) are different than other nature and 10:46:37  
16 circumstances types of cases. Can you address that 10:46:40  
17 issue -- I mean, that is why I was asking, is there any 10:46:43  
18 authority that deals with the type of evidence that 10:46:49  
19 comes in on an (A)(5) specification? And I can tell 10:46:53  
20 you that in my research I found very little that dealt 10:46:59  
21 with (A)(5). I mean, there just aren't that many out 10:47:02  
22 there and the ones that you find are usually course of 10:47:05  
23 conduct cases not a prior conviction -- 10:47:08

24 MR. EICHEL: Exactly. 10:47:10

25 JUDGE NASTOFF: -- case, and so there appears to 10:47:12

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1 be a dearth of case law in this particular point and so 10:47:15  
2 I was wondering if you could, either of you address 10:47:20  
3 that argument. 10:47:23

4 MR. EICHEL: The Court's research is equal to mine 10:47:26  
5 and I have not found specific cases on this other than 10:47:30  
6 the prior trial of Von Clark Davis. And that is at 10:47:36  
7 page 410 of the previous transcript in the mitigation 10:47:40  
8 phase. 10:47:45

9 MR. PORTER: Just two responses and I will be 10:47:52  
10 brief. First is I direct the Court to the version of 10:47:57  
11 2929 -- and I am just sort of expanding upon the 10:48:03  
12 argument in response to Judge -- my earlier response to 10:48:08  
13 Judge Pater. Is if you look at the (A)(5) language 10:48:13  
14 itself, it talks about prior to the offense at bar the 10:48:17  
15 offender was convicted of an offense an essential 10:48:22  
16 element of which, so I think the way the statute lays 10:48:26  
17 it out talks about the specification is the prior 10:48:31  
18 conviction, as opposed to the facts of the prior 10:48:33  
19 conviction. 10:48:36

20 Since it is clear I think the Court is bound by 10:48:39  
21 that. If there is any question as to the 10:48:43  
22 interpretation, I believe the Court has to apply the 10:48:45  
23 interpretation that is most favorable to the defendant, 10:48:51  
24 and finally, and I have the most respect in the world 10:48:56  
25 for Prosecutor Eichel, and I may have heard him wrong 10:48:59

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1 and I apologize Mr. Eichel if I heard you wrong, but my 10:49:05  
2 recollection is the prior trans -- of the prior 1984 10:49:08  
3 proceedings, and correct me if I am wrong, Your Honors, 10:49:13  
4 is that there was no testimony other than the 10:49:18  
5 stipulation as to the prior offense with respect to 10:49:23  
6 proving the aggravating circumstance. And if there 10:49:28  
7 was, I stand corrected, but I see no need to reopen the 10:49:31  
8 issue if it, in fact, has been proven, and there was no 10:49:36  
9 need to introduce the facts of the earlier offense at 10:49:40  
10 that time, why is there a need to do so now? 10:49:46

11 JUDGE NASTOFF: To address that last issue, what I 10:49:50  
12 can tell you is obviously, there -- and perhaps Judge 10:49:53  
13 Pater and Judge Spaeth need to be brought up to speed 10:49:59  
14 on some of the issues that transpired pretrial, but we 10:50:01  
15 obviously had pretrial motions dealing with the extent 10:50:05  
16 to which the Court should familiarize itself with the 10:50:08  
17 transcript of the prior trial prior to today's hearing 10:50:13  
18 and it has been the defense's position throughout that 10:50:17  
19 the court should not have reviewed it at all prior to 10:50:20  
20 today's hearing. 10:50:25

21 This Court found that it was appropriate that 10:50:26  
22 there was a statutory duty for the Court to 10:50:30  
23 independently review the transcript, particularly the 10:50:36  
24 trial phase transcript to determine whether there is 10:50:41  
25 any mitigating issues or mitigating factors to be found 10:50:44

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1 pursuant, or regarding the nature and circumstances of 10:50:51  
2 the offense. It appears that there was Supreme Court 10:50:53  
3 case law that directed this Court, in fact, to conduct 10:50:58  
4 such an inquiry. This Court did not. This Court 10:51:02  
5 granted your motion to the extent that it dealt with 10:51:06  
6 other portions of the transcript. So neither I nor the 10:51:09  
7 other judges have reviewed the prior mitigation phase 10:51:12  
8 testimony or that portion of the transcript. 10:51:18

9 What I can say is from my review of the trial 10:51:21  
10 phase, I think Mr. Porter is correct. The only thing 10:51:24  
11 presented at the trial phase was a stipulation 10:51:26  
12 regarding the prior conviction and the judgment entry 10:51:31  
13 of conviction was presented. There was no additional 10:51:36  
14 testimony at the trial phase. So -- 10:51:40

15 MR. PORTER: And I have one additional point and I 10:51:45  
16 am sorry to stand up again, Your Honors, my old age I 10:51:48  
17 occasionally forget points, is I think, and we have 10:51:52  
18 been discussing Gumm today, I think the Court needs to 10:51:56  
19 be a little leery of Gumm. 10:51:59

20 JUDGE NASTOFF: It's been modified, we know. 10:52:01

21 MR. PORTER: Yes, and I think it is with respect 10:52:03  
22 to the matter that we were discussing today. 10:52:05

23 JUDGE NASTOFF: And I believe it is Wogenstahl 10:52:06  
24 that specifically modifies Gumm and so I -- all of us 10:52:08  
25 are aware that we should read Gumm in light of the 10:52:11

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1	subsequent modifications.	10:52:18
2	MR. PORTER: Thank you, Your Honor.	10:52:20
3	JUDGE NASTOFF: All right.	10:52:21
4	MR. OSTER: Your Honor, the only thing I may bring	10:52:22
5	up, when you are asking for case law and I have a	10:52:26
6	little snippet here I believe the case doesn't go into	10:52:32
7	it, just to try to possibly shed a little light and I	10:52:34
8	know there can be so much read from this but in the	10:52:37
9	case of <u>State v. Lamar</u> , L-A-M-A-R, it's 95 Ohio State	10:52:37
10	3d. 181, it's also citation 2002 Ohio 2128, it was an	10:52:43
11	(A)(5) murder specification and therein the Court noted	10:52:51
12	that in this case the aggravating circumstances are	10:52:55
13	grievous; Lamar, already incarcerated as a convicted	10:53:00
14	murderer was a ring leader in a murder spree that	10:53:01
15	killed five victims. That doesn't seem to just be	10:53:04
16	noting his conviction that he was convicted of	10:53:07
17	something else. It talks about a murder spree. It	10:53:12
18	talks about he was already convicted, but it seems to	10:53:15
19	indicate that there may be some facts behind some of	10:53:18
20	it, but again, it doesn't go into a lot of it. It is	10:53:21
21	the only other case that I can think of to maybe cite	10:53:24
22	to the Court just as you are trying to make your	10:53:26
23	decision.	10:53:27
24	JUDGE NASTOFF: We can look at that, although it	10:53:28
25	occurs to me from the facts that you presented that	10:53:28

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1 that could be a course of conduct (A)(5) case as 10:53:30  
2 opposed to -- 10:53:33

3 MS. COOK-REICH: Your Honor, I have a copy of the 10:53:36  
4 Rocky Barton transcript, which was the trial I spoke 10:53:37  
5 of. It's my only copy and I have some sticky notes on 10:53:41  
6 it. I'm willing to take those sticky notes off and 10:53:43  
7 direct you to the pages that speaks of. 10:53:45

8 JUDGE NASTOFF: I believe that was attached to 10:53:46  
9 your motion. All right. 10:53:48

10 MR. EICHEL: If Your Honor please, I may respond 10:53:50  
11 to Mr. Porter's comment? 10:53:53

12 THE COURT: Sure. 10:53:53

13 MR. EICHEL: I am well aware that the Court does 10:53:53  
14 not have and has not reviewed the mitigation phase of 10:53:55  
15 1984 trial and it should not. I would like to proffer 10:53:59  
16 though since my statement has been called into question 10:54:03  
17 by Mr. Porter, page 409, Sergeant Schmitz, Jim Schmitz 10:54:08  
18 was called to testify about the nature and 10:54:14  
19 circumstances of the 1970 murder of Ernestine Davis. 10:54:19  
20 He was allowed to testify, show photographs. We, in 10:54:26  
21 our work on this case, preparatory work, we found that 10:54:32  
22 Sergeant Schmitz at the early stage of preparation, was 10:54:38  
23 in no condition to testify. He has since passed away. 10:54:42  
24 He died in May of this year. At any rate, he also 10:54:47  
25 identified photographs which we discovered are no 10:54:50

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1 longer in existence regarding that case, so we 10:54:54  
2 deliberately realized we could not use Sergeant 10:55:01  
3 Schmitz. We found another means to present the nature 10:55:05  
4 and circumstances of this aggravating circumstance to 10:55:08  
5 the Court involving the elements of the offense, 10:55:10  
6 involving the purposeful killing of another person 10:55:15  
7 Ernestine Davis. 10:55:20

8 JUDGE NASTOFF: All right. Do you have questions? 10:55:20  
9 (Judges confer with one another). 10:55:52

10 JUDGE NASTOFF: All right. I'm going to indicate 10:57:35  
11 for the record that we have discussed the motion. We 10:59:21  
12 have reviewed the written arguments and also considered 10:59:29  
13 in light of the arguments presented today, and the 10:59:34  
14 Court's concern is that the prior case law presented, 10:59:47  
15 none of it is (A)(5). And the Court is concerned that 10:59:55  
16 that is an important distinction to be made. The Court 10:59:59  
17 is going to indicate that while the law requires us to 11:00:05  
18 consider evidence and testimony about the nature and 11:00:12  
19 circumstances of the aggravating circumstance that is 11:00:18  
20 relevant to the aggravating circumstance, what the 11:00:22  
21 State is going to be expected to present is evidence 11:00:25  
22 that is relevant to the conviction, the nature and 11:00:29  
23 circumstances relevant to the fact of the conviction so 11:00:40  
24 that is what the State is going to be limited to as we 11:00:43  
25 go forward. Does that fairly state our ruling? 11:00:45

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1 JUDGE SPAETH: I think it fairly states the 11:00:50  
2 ruling. This is Judge Spaeth for the record. In terms 11:00:53  
3 of (A)(5) is the only aggravating factor that deals 11:00:59  
4 with and actually states was convicted of an offense, 11:01:04  
5 none of the other aggravating factors deal with a prior 11:01:10  
6 conviction. This would leave this Court to rule 11:01:14  
7 otherwise, into going into the nature and circumstances 11:01:20  
8 of a murder that occurred ten-plus years prior to the 11:01:25  
9 1983 murder at the case at bar. I don't think that 11:01:33  
10 that -- and none of the case law would permit it. 11:01:39  
11 Newton doesn't deal with an (A)(5) as Judge Nastoff 11:01:44  
12 indicated. 11:01:50

13 In reading the statute itself, that is 11:01:53  
14 2929.04 (A)(5), we are dealing with conviction, I think 11:01:56  
15 that is a valid distinction. And the Court, of course, 11:02:02  
16 must comply with 2929.03(D)(1) which would require that 11:02:08  
17 this Court hear evidence that is relevant to the nature 11:02:14  
18 and circumstances of the aggravating circumstance 11:02:17  
19 defendant was found guilty of committing, and I think 11:02:20  
20 this Court, and Judge Nastoff I think has indicated, is 11:02:25  
21 willing to entertain that evidence, but it's going to 11:02:28  
22 have to be evidence as set forth in .04 (A)(5) evidence 11:02:33  
23 of the nature and circumstances of the prior conviction 11:02:40  
24 not of the underlying nature and circumstances of the 11:02:44  
25 murder itself. So it is a rather narrow ruling. So, 11:02:49

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1           that is my clarification. I don't know whether Judge  
2           Pater has anything.

3           JUDGE PATER: Well, if I were alone I would have  
4           ruled otherwise. It is a majority rule up here,  
5           obviously, and we all read the law and we try to apply  
6           it as we deem best, and see it to be. In my mind, the  
7           Court's ruling is a little overly narrow. I don't  
8           believe the intent of the statute was to separate the  
9           conviction of a previous murder from the commission of  
10          the previous murder. I would read that statute a  
11          little more broadly. I do think there is some reason  
12          to do so as set forth in the Newton case, which was a  
13          different setting of course, but in the description of  
14          the detention, the Court in the Newton case did not  
15          just state he was in detention; factor proven or  
16          circumstance proven, that is all we need to get into.

17          The Court talked about the nature of the  
18          detention, as if the nature of the detention had some  
19          force, there was some reason for getting into that,  
20          about where he was, and being switched from one type of  
21          cell to another type of cell and all of that had  
22          nothing to do with the murder itself, it has peripheral  
23          things to do, but they seem to be getting into that  
24          just to elaborate on the fact that is the aggravating  
25          circumstance that he was in detention.

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1 I think for the (A)(5) section we are talking 11:04:45  
2 about a previous conviction -- the conviction of or for 11:04:48  
3 a previous murder, that the intent there was that the 11:04:53  
4 murder itself was the fundamental thing, not merely the 11:04:58  
5 conviction. So I would have ruled otherwise had it 11:05:03  
6 been just me. 11:05:07

7 JUDGE NASTOFF: But for the record, we have 11:05:08  
8 collaborated and considered the arguments of all of the 11:05:11  
9 judges and our ruling is as was set forth by myself and 11:05:13  
10 Judge Spaeth. So anything further we need to take up 11:05:17  
11 on that issue or any other preliminary issue? And does 11:05:20  
12 counsel contemplate opening statements in this matter 11:05:24  
13 or do you wish to go directly to presentation of 11:05:28  
14 evidence? 11:05:31

15 MR. OSTER: First, Your Honor, I would like our 11:05:32  
16 objection to that ruling noted. Specification such as 11:05:33  
17 child under 13, we don't think all you would be allowed 11:05:36  
18 to do is put a birth certificate on if the child was 11:05:40  
19 under 13. We don't think all you would be able to do 11:05:42  
20 is say President Obama is the president of the United 11:05:44  
21 States. We don't think all you would be able to do is 11:05:47  
22 say a person is a police officer. All of those could 11:05:48  
23 be under the same twisted logic the defense has put 11:05:50  
24 forward, status offenses. No case in the Ohio Supreme 11:05:53  
25 Court has ever read any of these specifications that 11:05:58

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1 narrowly and so we would like our objection to be noted 11:06:00  
2 for the record. 11:06:03

3 JUDGE NASTOFF: It's noted, but -- 11:06:04

4 JUDGE SPAETH: Mr. Oster, under all of those 11:06:05  
5 circumstances -- and it has been ruled upon, but I 11:06:07  
6 would like to put on the record -- all of those 11:06:09  
7 circumstances deal with the status of the victim in the 11:06:12  
8 murder at bar. Not -- none of those circumstances, 11:06:18  
9 aggravated circumstances, that you have set forth deal 11:06:24  
10 with a prior murder, or prior aggravating factor that 11:06:28  
11 is completely divorced, completely separate from the 11:06:37  
12 murder at bar. 11:06:40

13 So I just want to make it clear that that goes a 11:06:43  
14 long ways towards the Court's -- well, that is a 11:06:48  
15 consideration that the Court took under advisement when 11:06:51  
16 making its ruling. 11:06:56

17 JUDGE NASTOFF: Your objection is preserved. 11:06:57

18 MR. OSTER: Thank you, Your Honor. 11:06:59

19 JUDGE NASTOFF: All right. Anything further? Did 11:07:00  
20 we want to go into opening statements at this point in 11:07:03  
21 time? 11:07:06

22 MR. OSTER: Your Honor, I would ask for maybe a 11:07:07  
23 brief recess so we can call off witnesses we have 11:07:08  
24 waiting currently outside the courtroom. 11:07:11

25 JUDGE NASTOFF: All right. Any objection? What 11:07:13

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1	do you need, ten minutes or so?	11:07:15
2	MR. OSTER: Yes, Your Honor.	11:07:17
3	MR. PORTER: We have not -- just for a	11:07:18
4	housekeeping matter for the Court is we do intend and	11:07:19
5	our prepared to make an opening statement. Because we	11:07:24
6	thought this morning's session was going to last a	11:07:27
7	little bit longer, assuming that the State of Ohio will	11:07:31
8	not be calling anyone, our first witness will not be	11:07:34
9	ready 'til 1:00, Your Honor.	11:07:36
10	JUDGE NASTOFF: All right. Well, we still, I	11:07:39
11	believe, need to go through evidence that the State may	11:07:42
12	wish to introduce from the prior trial. I don't know	11:07:47
13	if they are going to argue that any of that is relevant	11:07:51
14	for purposes of the sentencing hearing. We do need to	11:07:55
15	address that issue. We need to address any other	11:07:58
16	evidence that they would be offering, whether it is by	11:08:01
17	live testimony or by journal entry or whatever form it	11:08:07
18	may take. But prior to that, I would imagine that we	11:08:09
19	would hear opening statements from counsel. We could	11:08:12
20	address those issues and then take a break before your	11:08:15
21	witnesses are available.	11:08:17
22	MR. PORTER: Okay. Thank you very much, Your	11:08:18
23	Honors.	11:08:21
24	JUDGE NASTOFF: Thank you. We'll be in a recess.	11:08:22
25	(Recess taken at this time.)	11:08:24

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1 JUDGE NASTOFF: We are back on record in State of  
2 Ohio vs. Von Clark Davis, CR1983-12-0614. All parties  
3 and counsel present prior to our recess are again  
4 present. And at this time are the -- is counsel ready  
5 to proceed with any opening statement?

6 MR. EICHEL: We are, Your Honor.

7 JUDGE NASTOFF: All right.

8 MR. PORTER: We are prepared, Your Honor.

9 JUDGE NASTOFF: All right. Mr. Eichel, are you  
10 going to be delivering the opening statement?

11 MR. EICHEL: Yes, sir.

12 JUDGE NASTOFF: You may proceed.

13 MR. EICHEL: Thank you, Your Honor. May it please  
14 the Court, because this is a resentencing hearing, an  
15 opening statement, I believe, is in order to begin it.

16 In the usual capital case, we have the trial last  
17 week, or ending Friday maybe, with a verdict of guilty  
18 with the aggravating circumstance and the crime  
19 charged, the evidence just being heard about that by  
20 the same panel. We don't have that in this case. In  
21 that situation we would probably waive an opening  
22 statement here and go directly to the evidence, but in  
23 this case, we join the case 25 years in progress. And  
24 if it is true that the purpose of an opening statement  
25 is to state what the evidence will show, what the

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1 evidence will be considered in arriving at your 11:29:26  
2 decision, that decision you will ultimately make in 11:29:29  
3 this case, that is what I hope to do here. That is the 11:29:33  
4 only thing I intend to do. 11:29:38

5 The procedure I believe is that the State of Ohio 11:29:41  
6 is permitted and will reintroduce from the trial any 11:29:43  
7 evidence that is relevant to the aggravating 11:29:48  
8 circumstance. And also, the evidence under statute 11:29:51  
9 2929.04 (B) states that this Court, the trial jury, or 11:29:59  
10 panel of three judges shall consider and weigh against 11:30:09  
11 the aggravating circumstances proved beyond a 11:30:15  
12 reasonable doubt the nature and circumstances of the 11:30:18  
13 offense, the history, character and background of the 11:30:21  
14 offender, and all of the following enumerated factors, 11:30:27  
15 which go without saying, are mitigating factors. 11:30:34

16 We were put on notice last week that the defense 11:30:42  
17 is relying on the (A)(7), any other factors that are 11:30:47  
18 relevant to the issue to whether the offender should be 11:30:52  
19 sentenced to death. 11:30:55

20 JUDGE NASTOFF: That would be (B)(7). 11:30:57

21 MR. EICHEL: Under (B)(7), yes. It is my 11:30:59  
22 understanding of the law -- Ohio law, that prosecutors 11:31:04  
23 should not make any comment on the defense evidence 11:31:08  
24 unless and until the defense introduces it. So at this 11:31:10  
25 point of the trial, I am expressly not making any 11:31:15

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1 anticipatory statement about what the evidence will be 11:31:19  
2 in regard to the defense evidence in this case. We 11:31:23  
3 will reserve our comments on that until such time that 11:31:25  
4 it is appropriate. 11:31:30

5 But as I state, the Court is charged under (B) -- 11:31:34  
6 Section B of 2929.04 to consider and weigh against the 11:31:38  
7 aggravating circumstance in this case, quote -- I lost 11:31:45  
8 my place -- the nature and circumstances of the 11:31:54  
9 offense; that being the offense at bar. 11:31:58

10 In that regard, the State will seek to reintroduce 11:32:03  
11 relevant portions of the trial that was heard in 1984 11:32:08  
12 for this Court to consider under this statute, whether 11:32:16  
13 any mitigating factors lies within those nature and 11:32:19  
14 circumstances of the offense that occurred in 1983. In 11:32:25  
15 that regard, the State will argue and we will state for 11:32:32  
16 an opening statement, that the evidence has shown and 11:32:37  
17 you will consider the evidence at trial that 11:32:40  
18 established that approximately 7:40 p.m. on December 11:32:44  
19 12, 1983 -- 11:32:49

20 JUDGE PATER: Before you go further, I would like 11:32:52  
21 to confer with the other judges briefly about the 11:32:54  
22 opening statement, where the State intends to go. 11:32:57

23 (Judges confer off the record.) 11:33:01

24 JUDGE NASTOFF: Mr. Eichel, before you proceed, I 11:35:34  
25 just wanted to make sure that the record is clear that 11:35:37

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1 we understand the statute and what you're indicating. 11:35:40  
2 We understand that the only purpose for the panel of 11:35:44  
3 judges to consider the nature and circumstances of the 11:35:50  
4 offense is to the extent that they may be mitigating, 11:35:52  
5 and only to weigh against the aggravating circumstance. 11:35:58  
6 We understand that the nature and circumstances of the 11:36:03  
7 offense are not an aggravating circumstance in this 11:36:05  
8 case, and are not to be weighed or considered as an 11:36:09  
9 aggravating circumstance in this case, only as 11:36:11  
10 mitigation. So with that being said, you may proceed. 11:36:15

11 MR. PORTER: At this point, Mr. Davis is going to 11:36:19  
12 interpose an objection. We do not plan on citing the 11:36:22  
13 nature and circumstances as a mitigating factor, just 11:36:26  
14 throwing it out there, doesn't make it an aggravating 11:36:32  
15 circumstance. Prosecution can't go forward and present 11:36:35  
16 evidence of mitigating factors we aren't going forward 11:36:39  
17 on and at that point we would ask the Court to preclude 11:36:42  
18 any testimony regarding the facts and circumstances, 11:36:46  
19 Your Honor. 11:36:49

20 (Judges confer off the record.) 11:36:57

21 JUDGE NASTOFF: All right. After conferring, the 11:37:12  
22 Court is aware of case law that would indicate that the 11:37:29  
23 absence of mitigating factors is not to be considered 11:37:32  
24 an aggravating circumstance. At this point in time, 11:37:36  
25 the Court is inclined to grant or to sustain the 11:37:40

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1 objection of defense counsel, and Mr. Eichel, if -- 11:37:44  
2 obviously if there are mitigating factors that are 11:37:51  
3 raised during the hearing of which the State has 11:37:54  
4 rebuttal evidence and would wish to comment at the 11:37:57  
5 appropriate time on that, you may reserve your right to 11:38:00  
6 do so, but at this point in time, we are going to 11:38:02  
7 sustain the objection because of the defense. 11:38:06

8 MR. EICHEL: With that said, may it please the 11:38:13  
9 Court, the State intends to reintroduce the judgment 11:38:20  
10 of conviction entry. I believe it was jointly 11:38:26  
11 stipulated at the trial -- 11:38:30

12 JUDGE NASTOFF: Do you have a page number, by 11:38:33  
13 chance? 11:38:36

14 MR. OSTER: 207 through 209. 11:38:36

15 MR. EICHEL: There were three exhibits identified. 11:38:40  
16 Only one of which is the conviction entry, and the 11:38:42  
17 record is rather confused as to which number. I 11:38:46  
18 believe it was number 30 actually, the way I read the 11:38:50  
19 record. There were two others, 23 and 24, State's 11:38:54  
20 Exhibits, all of which were jointly -- were stipulated 11:38:59  
21 in the trial for purposes of this hearing. Only the 11:39:03  
22 judgment of conviction as to second degree murder, 11:39:11  
23 April 20, 1971, was relevant. 11:39:17

24 THE COURT: All right. So you are offering the 11:39:22  
25 judgment entry of conviction pertaining to the finding 11:39:25

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1 of guilty of murder in the second degree, I believe 11:39:31  
2 that that is dated April 20, 1971, and any testimony in 11:39:34  
3 the transcript from the trial that is relevant or 11:39:40  
4 pertains to that judgment entry; is that correct? 11:39:43

5 MR. EICHEL: That is correct. And the stipulation 11:39:46  
6 by the parties at trial, not in the mitigation phase, 11:39:48  
7 but at trial phase upon which the conviction for the 11:39:53  
8 specification was rendered by the three-judge panel in 11:39:59  
9 1984. 11:40:02

10 JUDGE NASTOFF: All right. 11:40:05

11 MR. EICHEL: We would also add that there was 11:40:05  
12 further -- 11:40:09

13 JUDGE NASTOFF: Are you offering that now or are 11:40:10  
14 you simply indicating that that is what you are going 11:40:11  
15 to be doing? 11:40:13

16 MR. EICHEL: For an opening statement we are 11:40:14  
17 indicating that would be the case. We will also 11:40:15  
18 indicate that we will offer the same request for the 11:40:18  
19 Court to take judicial notice as was done at the trial 11:40:22  
20 in regard to former Revised Code Section 2901.05, the 11:40:27  
21 elements of which set forth clearly no person shall 11:40:34  
22 purposely and maliciously kill another, the basis for 11:40:37  
23 the judgment of conviction entry. 11:40:41

24 I believe the Court then took judicial notice and 11:40:46  
25 this Court should also take judicial notice in 11:40:51

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1 considering those facts. And considering the fact that 11:40:55  
2 I believe I should not comment on mitigating evidence 11:41:00  
3 yet to be introduced, the State would ask this Court to 11:41:07  
4 proceed. Thank you. 11:41:10

5 JUDGE NASTOFF: Thank you, Mr. Eichel. Mr. 11:41:12  
6 Porter? 11:41:14

7 MR. PORTER: May it please the Court, Judge 11:41:15  
8 Nastoff, Judge Pater and Judge Spaeth. I have not had 11:41:35  
9 the privilege of appearing before Judge Pater before 11:41:39  
10 and Judge Spaeth. Let me introduce myself. I am 11:41:42  
11 Randall Porter. I am an assistant state public 11:41:47  
12 defender. I have been with the state public defender's 11:41:50  
13 office since 1985 trying or litigating capital cases on 11:41:52  
14 some level, and prior to that I was an assistant 11:41:57  
15 prosecutor for five years in a rural Ohio county. 11:42:01

16 I need to do a housekeeping up front, and I need 11:42:05  
17 to apologize to Judge Pater. Ms. Cook-Reich made sure 11:42:09  
18 that I took the blame for it. Being out-of-town 11:42:14  
19 counsel, I have repeatedly misspelled your name on the 11:42:17  
20 pleadings on the caption of the pleading. 11:42:22

21 JUDGE PATER: I never even noticed it, but your 11:42:25  
22 apology is accepted. 11:42:30

23 MR. PORTER: No disrespect meant to you, Your 11:42:30  
24 Honor. There is nothing worse than spelling someone's 11:42:32  
25 name wrong. I hate it when people spell Randall wrong, 11:42:35

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1           so I apologize to you. 11:42:39

2           JUDGE PATER: I have been called Porter many times 11:42:40  
3           and Peter, all kinds of things, Prator. That is fine. 11:42:44  
4           Thank you. 11:42:46

5           MR. PORTER: Thank you for your understanding, 11:42:47  
6           Your Honor. I am going to be brief today. The 11:42:48  
7           three-judge panel will hear over the next three days 11:42:51  
8           that Von was raised in a dysfunctional environment. 11:42:56  
9           Over the next three days, the three-judge panel will 11:43:02  
10          hear from a mental health expert, Dr. Robert Smith, the 11:43:05  
11          impact that had upon Von. During the next three days, 11:43:11  
12          the panel will hear that Von is indeed sorry and 11:43:15  
13          remorseful. 11:43:20

14          During the next three days, the panel will hear 11:43:22  
15          that Von has been of good behavior. That is not the 11:43:26  
16          issue I want to address with you in opening statement, 11:43:31  
17          though that gives you a brief background. 11:43:35

18          The theme that will go through our presentation of 11:43:38  
19          the evidence for the next three days is that, and I 11:43:42  
20          want to choose the correct terminology and sometimes 11:43:47  
21          I'm guilty of not choosing the correct terminology, is 11:43:50  
22          that the impact that this Court makes with respect to a 11:43:54  
23          life or death decision may really have very little 11:44:01  
24          impact in this case. 11:44:05

25          The evidence will show that Von's 62 years of age. 11:44:08

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1 If I do my math correctly, and if we give him credit 11:44:13  
2 from the time of the offense in December 12 of this 11:44:19  
3 year, he will have served 25 years. If the Court 11:44:24  
4 determines to impose a sentence of less than death, 11:44:30  
5 because it's under the old law, the maximum sentence 11:44:35  
6 that the Court can impose is 30 years to life. You all 11:44:39  
7 are well aware that is 30 actual years plus the offense 11:44:44  
8 of weapons under disability, which would be an 11:44:47  
9 additional year-and-a-half. He would be credited for 11:44:50  
10 good -- 11:44:55

11 MR. EICHEL: Your Honor, that sentence was not 11:44:57  
12 reversed and is not part of the consideration here. 11:45:00

13 JUDGE NASTOFF: On the weapons under disability? 11:45:03

14 MR. EICHEL: That's correct. 11:45:04

15 MR. PORTER: Then he looks at a sentence for a 11:45:05  
16 year-and-a-half that the Court can run consecutive to 11:45:07  
17 the 30 years to life if the Court determines to impose 11:45:10  
18 a 30-to-life sentence. He would be entitled to good 11:45:14  
19 time credit, so if my math is correct, he would be 11:45:18  
20 eligible for parole in six years. However, that is 11:45:21  
21 really not accurate. We have subpoenaed, and you will 11:45:26  
22 hear from Cynthia Mausser, who is the head of the Ohio 11:45:32  
23 Parole Board, who will testify based upon his prior 11:45:40  
24 record, the fact that he committed the second murder, 11:45:45  
25 while he was still on parole from the first murder is 11:45:50

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1           that he will not be paroled. 11:45:53

2           So while ELWOP is not available to you, it is a, 11:45:56  
3           for lack of a better term, a very de facto possibility 11:46:05  
4           in this case when you compare that to if the Court 11:46:09  
5           imposes a sentence of death. We already have litigated 11:46:15  
6           this case for I think 25 years. We will be asking the 11:46:21  
7           Court to take judicial notice of some statutes. The 11:46:25  
8           State of Ohio has chosen to expedite the appeal 11:46:30  
9           process. Those appeals will not -- the expedited 11:46:34  
10          direct appeal process will not apply to Von. He will 11:46:39  
11          have two rights of appeal, one to the Court of Appeals, 11:46:43  
12          and one to the Ohio Supreme Court. 11:46:47

13          Furthermore, the State of Ohio in 1996, expedited 11:46:50  
14          the post-conviction process, so you file your 11:46:57  
15          post-conviction petition while your first -- well, 11:47:01  
16          wouldn't be the only direct appeal. We will be asking 11:47:06  
17          the Court to take judicial notice of the fact that 11:47:09  
18          Von's post-conviction, if the Court imposes death, will 11:47:16  
19          not be due until after he is pursuing his appeal in the 11:47:20  
20          Ohio Supreme Court. We will be asking the Court to 11:47:25  
21          take judicial notice of 2953.21. 11:47:28

22          While it is doubtful that if the Court imposes 11:47:34  
23          death again his appeal will run 25 years, it will run 11:47:40  
24          for a significantly long period of time, meaning that 11:47:45  
25          he most likely will die of natural death prior to his 11:47:48

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1 appeals ending from any death sentence. What the Court  
2 does vote, and I only have one of two minutes left on  
3 the promise to the Court I would be brief, is the  
4 Court's decision very much impacts other than Von in  
5 this case.

6 The Court's decision will give some chance for  
7 closure for the victim's family. The Court's decision,  
8 if they decide to impose life with parole eligibility  
9 'til he has served 30, we will note from Ms. Mausser's  
10 testimony that he will never be paroled. It will also  
11 bring closure to Von's family, and they are also a  
12 victim in this process.

13 Third, if the Court imposes a sentence of less  
14 than death and Von is asking for 30 to life, it will  
15 end the litigation that has gone on for 25 years. I  
16 counted last night, and if my number is correct, this  
17 case has already seen 18 courts. When I got the case  
18 back from previous counsel, just putting the pleadings  
19 from the 25 years filled 29 of these volumes.

20 MR. EICHEL: If Your Honor please, this has gone  
21 way beyond what the evidence will show. And into, very  
22 deeply into argument. It's not the purpose of opening  
23 statement.

24 JUDGE NASTOFF: All right. Well, I think he is  
25 asking that we would take judicial notice of certain

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1 aspects and to that extent, we will overrule the 11:49:36  
2 objection, but yes, this is to be opening statement not 11:49:39  
3 argument at this time. 11:49:42

4 MR. PORTER: And I just have one additional point 11:49:45  
5 and finally, if the Court, and we are planning on 11:49:46  
6 introducing evidence, if the Court determines that a 11:49:51  
7 sentence of 30 to life is appropriate, it will bring 11:49:56  
8 some closure for the taxpayers. We plan on introducing 11:50:02  
9 evidence that it's much more costly to house Von on 11:50:06  
10 death row than it is in general population. 11:50:15

11 Finally, it is some closure for the tax payer who 11:50:22  
12 will not have to pay for 18 rounds of appeals. Thank 11:50:25  
13 you very much, Your Honors. 11:50:29

14 JUDGE NASTOFF: Thank you, Mr. Porter. Mr. 11:50:40  
15 Eichel, it is about six or seven minutes to 12:00, did 11:50:43  
16 you wish to present your evidence at this time? 11:50:47

17 MR. EICHEL: Yes, Your Honor. We have a duplicate 11:50:50  
18 copy of what was introduced at trial, State's Exhibit, 11:50:54  
19 I believe it was 30, judgment of conviction entry. It 11:50:58  
20 was stipulated to. Case number 21655. 21655 State of 11:51:03  
21 Ohio vs. Von C. Davis. Conviction entry dated April 11:51:12  
22 20, 1971, file stamped by Clerk of Common Pleas Court 11:51:16  
23 Edward S. Robb, Junior, at that time. Journal 231 page 11:51:23  
24 21 and page 22. 11:51:28

25 JUDGE NASTOFF: All right. Defense wish to be 11:51:31

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1 heard on that? 11:51:32

2 MS. COOK-REICH: We stipulate to that Exhibit. 11:51:33

3 THE COURT: Is it marked? 11:51:33

4 MS. COOK-REICH: I will not stipulate to what 11:51:35

5 number it was in the trial court because the transcript 11:51:36

6 is kind of unclear as to which specific exhibit it was. 11:51:39

7 JUDGE NASTOFF: Why don't we have it marked as a 11:51:42

8 new exhibit for purposes of this new sentencing 11:51:44

9 hearing? 11:51:46

10 MR. EICHEL: State's Exhibit 1 for purposes of 11:51:47

11 this hearing. 11:51:48

12 JUDGE NASTOFF: All right. 11:51:49

13 MR. PORTER: Just so we keep the record clear, 11:51:50

14 could defense counsel review the exhibit prior to 11:51:54

15 stipulating, Your Honor? 11:51:58

16 JUDGE NASTOFF: Certainly. 11:52:00

17 MR. EICHEL: Absolutely. 11:52:01

18 MR. PORTER: And that's not meant for Mr. Eichel. 11:52:02

19 That was meant for the reviewing court later on. 11:52:05

20 JUDGE NASTOFF: Certainly appropriate. 11:52:08

21 MS. COOK-REICH: Thank you, Your Honor. 11:52:20

22 MR. EICHEL: Subject to the Court's ruling earlier 11:52:42

23 today, we have no other evidence at this time, at this 11:52:46

24 point in the case to present. 11:52:52

25 JUDGE NASTOFF: All right. And you've had a 11:52:54

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1 chance to review State's Exhibit 1 and is it stipulated 11:52:56  
2 to? 11:52:59

3 MS. COOK-REICH: Yes, Your Honor. 11:52:59

4 JUDGE NASTOFF: All right. State's Exhibit 1 will 11:53:00  
5 be admitted into evidence for purposes of this 11:53:01  
6 sentencing hearing. With that, at this time the State 11:53:03  
7 rests; is that correct? 11:53:07

8 MR. EICHEL: Yes, Your Honor. 11:53:08

9 JUDGE NASTOFF: All right. Then, you indicated 11:53:09  
10 you had a witness available at 1:00. It's approaching 11:53:12  
11 the lunch hour, so what I would suggest is that we go 11:53:15  
12 ahead and recess for the lunch hour. When we come 11:53:18  
13 back, the defense can proceed with their evidence. One 11:53:20  
14 thing that I do just want to note for the record before 11:53:25  
15 we recess, is that even though we don't have a jury 11:53:29  
16 here, this is a three-judge panel, that Mr. Davis does 11:53:33  
17 appear dressed out today. He is not in jail garb and 11:53:36  
18 he is in court free of any shackles or restraints. I 11:53:40  
19 did want the record to reflect that being the case. So 11:53:46  
20 anything further before we recess for lunch? 11:53:50

21 MR. PORTER: We have nothing. Thank you, Your 11:53:53  
22 Honor, for asking. 11:53:55

23 MR. OSTER: No, Your Honor. 11:53:56

24 JUDGE NASTOFF: If counsel could be back here 11:53:57  
25 about five minutes to 1:00. 11:54:00

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1	(Recess taken at this time.)	11:54:04
2	JUDGE NASTOFF: We are back on record in State of	01:04:26
3	Ohio vs. Von Clark Davis, CR83-12-0614. Mr. Davis is	01:04:31
4	again present with his counsel, the State's	01:04:38
5	representatives are present, and all three members of	01:04:41
6	the panel are present.	01:04:44
7	The State has introduced its evidence and has	01:04:46
8	rested, so at this time we would turn to the defense.	01:04:49
9	Do you have any evidence that you wish to present in	01:04:54
10	mitigation?	01:04:57
11	MR. PORTER: We do, a housekeeping matter up front	01:04:58
12	if we could, Your Honor.	01:05:03
13	JUDGE NASTOFF: Sure.	01:05:04
14	MR. PORTER: During the lunch hour we filed a	01:05:04
15	witness list with the clerk. I believe that the	01:05:07
16	bailiff put a copy for each of you before you, exhibit	01:05:10
17	list, an exhibit list, excuse me, Your Honor, that was	01:05:16
18	my mistake. And we also filed with the Court a	01:05:21
19	notebook that has all of the proposed exhibits in it,	01:05:24
20	thought that would make it easier for purposes of the	01:05:27
21	Court reviewing exhibits. I appear in some courts	01:05:30
22	where the judge actually requires it and I hope that	01:05:33
23	that was okay with the Court.	01:05:36
24	JUDGE NASTOFF: We appreciate it. Has a copy been	01:05:37
25	given to the State as well?	01:05:41

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1 MR. OSTER: It was provided to us as we came in 01:05:42  
2 this morning. 01:05:45

3 JUDGE NASTOFF: Thank you, Mr. Porter. 01:05:46

4 MR. PORTER: And then we have a legal issue that 01:05:47  
5 we would like to raise with the Court. It is -- as the 01:05:49  
6 Court is well aware, Mr. Davis has the right to make an 01:05:52  
7 unsworn statement. It is our intent that he will make 01:05:56  
8 it now. We have prepared a pleading for the Court's 01:06:00  
9 review, which we have not filed, which we will provide 01:06:04  
10 the Court and the prosecutor now. It is very brief 01:06:06  
11 asking the Court's permission to use a question and 01:06:09  
12 answer format for purposes of the unsworn statement. 01:06:13  
13 So with the Court's permission, would approach it for 01:06:16  
14 the purposes of providing it with a copy of the 01:06:18  
15 pleading? 01:06:21

16 JUDGE NASTOFF: You may. 01:06:22

17 MR. PORTER: Would the Court want the original to 01:06:32  
18 go to the court reporter or to go to you, the presiding 01:06:34  
19 judge? 01:06:46

20 JUDGE NASTOFF: Court reporter is fine. 01:06:46

21 MR. PORTER: Thank you. And I apologize again to 01:06:47  
22 Judge Pater for spelling his name wrong. I promise it 01:06:51  
23 will be done correctly in the future pleadings. 01:06:52

24 JUDGE PATER: No problem. I appreciate your 01:06:57  
25 sensitivity to it. 01:07:00

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1 JUDGE NASTOFF: I'm reading this and then we will 01:07:41  
2 elicit any response from the State. Does the State 01:07:43  
3 wish to be heard on the motion? 01:08:11

4 MR. EICHEL: Two points, Your Honor: The State 01:08:15  
5 has no general objection to this, being that it is a 01:08:20  
6 three-judge panel and we're well aware that the Court 01:08:26  
7 is familiar with the difference between sworn testimony 01:08:29  
8 and unsworn statement. If it were a jury, we would 01:08:33  
9 argue otherwise, and the Court, of course, has 01:08:37  
10 discretion to allow it in this fashion. I would agree 01:08:38  
11 to this with the caveat that this still is the 01:08:44  
12 defendant's unsworn statement, not the counsel's 01:08:52  
13 statement so we would object in advance to any leading 01:08:57  
14 questions that would be sustainable. 01:09:00

15 JUDGE NASTOFF: All right. Any last word on it 01:09:05  
16 before we confer? 01:09:08

17 MR. PORTER: We have nothing. We think that Mr. 01:09:10  
18 Davis has a right if counsel asks questions, if not we 01:09:13  
19 think under Ohio law the Court has the discretion and 01:09:17  
20 we would ask the Court to exercise its discretion and 01:09:20  
21 let Ms. Cook-Reich ask what questions she believes 01:09:23  
22 would be appropriate, and they would not be leading 01:09:26  
23 questions. 01:09:29

24 JUDGE NASTOFF: All right. 01:09:30

25 (Judges confer off the record.) 01:09:31

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1	JUDGE NASTOFF: All right. The Court will	01:10:14
2	unanimously approve the motion and permit the unsworn	01:10:16
3	statement to be given in question and answer format.	01:10:20
4	MS. COOK-REICH: Von, if you would take the stand.	01:10:32
5	JUDGE NASTOFF: Mr. Davis, what I would advise	01:10:49
6	before you begin your statement, the microphone that	01:10:51
7	you have there moves, so if you could move it over so	01:10:54
8	that it will pick up your voice, it will make it easier	01:10:57
9	for all of us to hear it.	01:11:00
10	THE WITNESS: Okay.	01:11:02
11	JUDGE NASTOFF: You may proceed.	01:11:03
12	DIRECT EXAMINATION	01:11:03
13	BY MS. COOK-REICH:	01:11:03
14	Q. Von, you realize this is your unsworn statement.	01:11:06
15	You don't need to be sworn in. Can you state your name for	01:11:07
16	the record, please?	01:11:10
17	A. Von Clark Davis.	01:11:10
18	Q. Make sure you speak up just like Judge Nastoff	01:11:12
19	told you.	01:11:15
20	A. Okay.	01:11:15
21	Q. Your address, please?	01:11:16
22	A. [REDACTED] Forest Park.	01:11:17
23	Q. Where do you currently reside?	01:11:21
24	A. Ohio State Penitentiary, Youngstown, Ohio.	01:11:23
25	Q. Von, is there anything you would like to say to	01:11:29

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1 | this Court or family members? | 01:11:30

2 | A. Yes, there is. | 01:11:32

3 | Q. Go ahead. | 01:11:32

4 | A. I can't begin to imagine -- first of all, thank | 01:11:33  
5 | you for this time. I can't begin to imagine the pain and | 01:11:40  
6 | grief I have caused the Butler family with the horrendous loss | 01:11:45  
7 | of their loved one. It was a senseless act, so callous, so | 01:11:53  
8 | cowardly, so unforgiveable and was perpetrated by me, me | 01:12:04  
9 | alone. Truthfully, how does one ask for forgiveness when | 01:12:10  
10 | you've done something so unforgivable, not once, but twice? | 01:12:17  
11 | The answer actually eludes me as well as the courage. But | 01:12:23  
12 | through this Court I would sincerely like to express my | 01:12:29  
13 | deepest sincere regrets, prayers and apologies to the Butler | 01:12:35  
14 | family, especially Fransia Butler, who her mother I snatched | 01:12:41  
15 | from her heart. With that, I will repeat this was nothing but | 01:12:48  
16 | an evil act by me. | 01:12:52

17 | I would also like to apologize to my family who | 01:12:54  
18 | has been loving, has always cared for me, supported me, but I | 01:12:58  
19 | shamed and embarrassed them as well. I would like to | 01:13:03  
20 | apologize to Mr. Shanks, and Mr. Garretson, who I made it so | 01:13:08  
21 | difficult for them to defend me. And to the City, where I | 01:13:14  
22 | grew up, I wanted to give something back, but I gave back only | 01:13:20  
23 | a terrible black mark. To the Franklin family, I offer my | 01:13:26  
24 | deepest and sincere prayers, regrets and apologies. And I | 01:13:33  
25 | thank you for listening. | 01:13:40

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1	Q. Von, at some time -- point in time, as you said in	01:13:44
2	your statement there to the Judges, you take responsibility	01:13:50
3	for this?	01:13:55
4	A. Absolutely.	01:13:55
5	Q. Okay. You had asked for some persons to try to	01:13:56
6	mediate the situation?	01:14:01
7	A. Yes, I have.	01:14:02
8	Q. Do you recall when you first tried to do that?	01:14:03
9	A. Pardon me?	01:14:05
10	Q. Do you recall when you first tried to have another	01:14:07
11	party mediate this situation?	01:14:10
12	A. Years ago.	01:14:12
13	Q. Do you want to be put to death in the prison?	01:14:14
14	A. No.	01:14:20
15	Q. Are you asking the Court for something other than	01:14:21
16	death?	01:14:24
17	A. Yes. Yes, I am.	01:14:28
18	Q. No further questions. Anything else you want to	01:14:30
19	say? This is your last chance.	01:14:34
20	A. No, I am fine.	01:14:38
21	JUDGE NASTOFF: Thank you. Mr. Davis, you can	01:14:40
22	return to your seat at counsel table. Do you have any	01:14:41
23	further evidence or testimony?	01:14:55
24	MR. PORTER: We do. We would call Fran Welland.	01:14:56
25	She is in the attorney conference room.	01:15:03

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1	MS. COOK-REICH: It's the room on the side.	01:15:08
2	FRAN WELLAND	01:15:37
3	having been first duly sworn, was examined and testified under	01:15:37
4	oath as follows:	01:15:49
5	JUDGE NASTOFF: Mr. Porter, before you begin,	01:15:49
6	ma'am, I also want to advise you that the microphone	01:15:51
7	before you, the base can move, so if you feel the need	01:15:52
8	to move that around so that it picks up your voice	01:15:57
9	appropriately feel free to do that. And please keep	01:16:00
10	your voice up. Mr. Porter, you may proceed.	01:16:02
11	DIRECT EXAMINATION	01:16:02
12	BY MR. PORTER:	01:16:06
13	Q. Can you state your name for the three-judge panel,	01:16:06
14	please?	01:16:08
15	A. Surely, it's Francis Welland.	01:16:08
16	MR. PORTER: Is the Court able to hear her okay?	01:16:11
17	JUDGE NASTOFF: Yes.	01:16:13
18	JUDGE PATER: Yes.	01:16:15
19	JUDGE SPAETH: Yes.	01:16:16
20	Q. (BY MR. PORTER) And could you please spell your	01:16:17
21	later name for the court reporter?	01:16:18
22	A. W-E-L-L-A-N-D.	01:16:19
23	Q. Your address?	01:16:21
24	A. [REDACTED]	01:16:23
25	Q. And are you currently employed?	01:16:33

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1	A. I am.	01:16:35
2	Q. Could you please tell the Court what you do?	01:16:37
3	A. I am self-employed and I am a subtitler. I	01:16:39
4	subtitle television programs for the deaf.	01:16:45
5	Q. Do you know an individual by the name of Von Clark	01:16:48
6	Davis?	01:16:53
7	A. I do.	01:16:53
8	Q. And for the record, what name do you know him by?	01:16:54
9	A. I have always known him by Clark.	01:16:57
10	Q. Could you tell the Judges how you originally had	01:17:02
11	contact with Clark?	01:17:05
12	A. I was -- a long time ago, about 17 years ago or 18	01:17:07
13	years ago I was watching a TV documentary about life on death	01:17:15
14	row. It struck me I couldn't imagine a lonelier place. And I	01:17:19
15	got in contact with an organization that puts people in	01:17:26
16	contact to become pen-pals. They sent me away for a year to	01:17:29
17	think about it. I went back to them and they sent me Clark's	01:17:33
18	address, name and address and we have been writing ever since.	01:17:38
19	Q. Could you tell the Judges the first year that you	01:17:43
20	were communicating with him?	01:17:47
21	A. It was '92, 1992.	01:17:48
22	Q. With what regularity, have you communicated with	01:17:54
23	him since that time?	01:17:59
24	A. I would say monthly I have got -- I must have a	01:18:00
25	stack of two hundred, three hundred letters from him. We --	01:18:08

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1 he writes me, and I write back. Very often he writes me more 01:18:12  
2 than I write him. I have a busy life. Sorry, very often he 01:18:18  
3 writes me more than I write him, I have a busy life, and time 01:18:25  
4 passes. But it's normally every month or every two months I 01:18:29  
5 would say. 01:18:33

6 Q. Have you ever had an opportunity to visit with him 01:18:33  
7 face to face? 01:18:37

8 A. Yes, I have. Twice now. I think it was in '96, I 01:18:38  
9 was on vacation with my husband in Florida and I took -- I 01:18:50  
10 visited him in Ohio then. I took an internal flight and came 01:18:56  
11 up and saw him then. And then another year I think it was 01:19:02  
12 about 2000, I took a vacation in the States and did the same 01:19:06  
13 thing and visited with him then. 01:19:10

14 Q. Just so the record is clear, did you have an 01:19:12  
15 opportunity to visit with him this year also? 01:19:16

16 A. Sorry. Yes. Yes, by video when I came. I came 01:19:18  
17 over before when the hearing was scheduled originally and 01:19:24  
18 people were kind enough to allow us a visit at the local jail 01:19:29  
19 there. 01:19:34

20 Q. Do you see the individual in the courtroom that 01:19:34  
21 you know as Clark Davis? 01:19:36

22 A. Yes, I do. 01:19:38

23 Q. Could you please point him out and identify his 01:19:39  
24 clothing? 01:19:42

25 A. Yes, he is over here with a beige shirt. 01:19:43

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1	MR. PORTER: Your Honor, could the record reflect	01:19:48
2	that she has identified Mr. Davis?	01:19:50
3	JUDGE NASTOFF: So ordered.	01:19:52
4	Q. (BY MR. PORTER) You said you had mainly been in	01:19:53
5	contact with him through writing; is that correct?	01:20:01
6	A. Yes, it is.	01:20:03
7	Q. Could you describe for the Judges your	01:20:04
8	relationship with Clark?	01:20:07
9	A. He is my friend. What started out as, I don't	01:20:08
10	know, a humanitarian gesture, I never dreamt that I would ever	01:20:17
11	get a genuine friendship, we get on, he is my mate. We get	01:20:21
12	on. We talk about the world and that, and he is my friend.	01:20:25
13	Q. Are you currently writing any other individuals on	01:20:33
14	death row here in this country or any other country?	01:20:37
15	A. No. No.	01:20:39
16	Q. Have you at any other point in time written any	01:20:41
17	other individuals on death row in this country?	01:20:44
18	A. No, I haven't. No, just Clark.	01:20:46
19	Q. Through your communication with Clark, has he	01:20:50
20	provided you with anything?	01:20:59
21	A. Friendship. It's great to get his letters through	01:21:03
22	the post. It's always a big treat. I sit down and make a	01:21:09
23	little occasion of reading his letters, finding out what he	01:21:15
24	has been thinking about and doing recently. He makes me	01:21:18
25	laugh. Nothing of monetary value, but he is an incredible	01:21:22

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1 | artist, he has made me little gifts, little craft works that | 01:21:29  
2 | over the years I have got a few. | 01:21:36

3 | Q. Could you tell the Judges some of the topics of | 01:21:39  
4 | which you have communicated with him? | 01:21:44

5 | A. It's a long time and we talk about -- we talk | 01:21:45  
6 | about the world, what is going on. We talk about current | 01:21:52  
7 | affairs. He is very interested in what is going on in the | 01:21:55  
8 | world. We talk about our feelings about what is going on in | 01:21:59  
9 | our lives. He tells me his moods over the years, his moods | 01:22:04  
10 | obviously have been up and down, he tells me what he has been | 01:22:14  
11 | thinking about, what he thinks about when he is lying awake at | 01:22:16  
12 | 3:00 a.m. He has been very open and generous with his | 01:22:24  
13 | feelings to me. | 01:22:30

14 | Q. Are you aware of the term, manipulative? | 01:22:31

15 | A. Yes. Yes. | 01:22:36

16 | Q. And could you define that term as you understand | 01:22:37  
17 | for the Judges, please? | 01:22:40

18 | JUDGE PATER: I didn't hear that word. | 01:22:42

19 | MR. PORTER: Manipulative. | 01:22:45

20 | JUDGE PATER: Thank you. | 01:22:46

21 | A. It is somebody who would offer things for self | 01:22:51  
22 | personal gain, I suppose. | 01:22:58

23 | Q. Have you found Clark to be manipulative in his | 01:22:59  
24 | interactions with you? | 01:23:05

25 | A. Far from it. Far from it. No. | 01:23:07

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1	Q. Has he asked you for money?	01:23:11
2	A. Over the years maybe four or five times and a few	01:23:17
3	dollars, but no, no. I mean, that is not -- that never comes	01:23:25
4	into it. He spends a lot on postage and I am always amazed	01:23:29
5	that he -- he has never asked me for -- to help him out at all	01:23:35
6	more than a few times in 17 years.	01:23:40
7	Q. Have you found any of his letters to you to be	01:23:44
8	inappropriate?	01:23:47
9	A. No. No. He is my friend. It might be -- from	01:23:48
10	the outside it might seem odd, female writing to a male on	01:23:56
11	death row from so far away, but apart from the fact of him	01:24:03
12	being on death row, it is a normal -- a normal friendship. I	01:24:07
13	value him amongst my friends and he has never been	01:24:12
14	inappropriate in the manner I think you are talking about.	01:24:16
15	Q. Has he raised any sexual issues with you in his	01:24:20
16	letters?	01:24:28
17	A. No. No. He knows that -- no. He wouldn't do	01:24:29
18	that.	01:24:33
19	Q. We talked last night, didn't we?	01:24:33
20	A. Yes, of course.	01:24:36
21	Q. And I think you told me some of his letters have	01:24:37
22	been cheeky?	01:24:42
23	A. Yes, yes.	01:24:43
24	Q. Can you tell the Judges what you mean by cheeky?	01:24:44
25	A. I will just think. He makes me laugh. He talks	01:24:48

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1 about, I don't know, previous -- his previous life of being a 01:25:01  
2 young man when he was in the Navy, for example, and he makes 01:25:06  
3 me laugh. He has got a good humor. 01:25:13

4 Q. I think you mentioned earlier in one of your 01:25:17  
5 visits to the States you were with your husband? 01:25:20

6 A. Yes, that's right. 01:25:22

7 Q. Are you still with that husband? 01:25:25

8 A. I am, yes. 01:25:26

9 Q. And does he approve of your interaction with 01:25:27  
10 Clark? 01:25:30

11 A. He supports me a hundred percent. 01:25:30

12 Q. When you initially had contact with Clark, were 01:25:34  
13 you aware of the facts of his crime? 01:25:39

14 A. No. No. For a very long time I just didn't want 01:25:42  
15 -- I didn't want to know. That wasn't what the relationship 01:25:48  
16 was about. I am no lawyer. It was a friendship. 01:25:51

17 Q. At some point, did you become aware of the facts 01:25:56  
18 of the crime? 01:25:59

19 A. Yes. But it was only three or four years ago, two 01:26:00  
20 or three years ago. 01:26:05

21 Q. Could you tell the Judges how you became aware? 01:26:06

22 A. I was sat at the computer with nothing to do, and 01:26:11  
23 curiosity got the better of me. I put in his name and it came 01:26:17  
24 out. Yeah. We have never talked about it at all in all of 01:26:20  
25 those years. 01:26:26

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1 Q. Are you aware that there are really two murders in 01:26:29  
2 this case? 01:26:34  
3 A. I am. 01:26:34  
4 Q. And based upon however you came aware, are you 01:26:35  
5 aware that both of the victims were women? 01:26:38  
6 A. Yes, I am. 01:26:42  
7 Q. After you learned that information, did that 01:26:43  
8 impact upon your relationship with Clark? 01:26:48  
9 A. It floored me, of course. It didn't impact on the 01:26:52  
10 relationship. I thought about it long and hard and I thought 01:27:00  
11 about the person I knew and why I originally started writing 01:27:08  
12 to him. It didn't -- nothing changed. He was the same. He 01:27:10  
13 responds to my letters and, his responses to my letters and 01:27:16  
14 his letters were just the same. He didn't know. I didn't 01:27:21  
15 tell him at the time that I had found out. 01:27:24  
16 Q. Since you have become aware of the facts of the 01:27:27  
17 case, have you discussed the case with him? 01:27:31  
18 A. Yes. Very recently, this year because I agreed to 01:27:35  
19 come over and speak on his behalf. 01:27:44  
20 Q. And what did he tell you about the facts of the 01:27:47  
21 case? 01:27:49  
22 A. He -- I'm sorry, we haven't actually talked about 01:27:51  
23 the facts of the case even now. He has talked -- I have told 01:27:59  
24 him that I knew what had happened and I have seen all of the 01:28:03  
25 reports and I have read previous court reports. He -- and 01:28:06

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1 that was the first time we broached the subject. When he 01:28:11  
2 replied, he expressed unremitting remorse and sorrow. I think 01:28:15  
3 he said embarrassment, shame, I have it in the letter. 01:28:24

4 Q. Can you -- have you brought the letter with you? 01:28:32

5 A. I do have the letter if that's... (witness 01:28:35  
6 retrieves letter) do you want me to read it? 01:28:44

7 Q. What you believe to be the relevant portion and 01:28:49  
8 then we will share the rest with the prosecutor. 01:28:52

9 MR. OSTER: Your Honor, I would like to state that 01:28:55  
10 we have never seen this letter or got it in discovery 01:28:57  
11 or anything. 01:29:01

12 MR. PORTER: We aren't planning on introducing it 01:29:01  
13 and I don't think we have to turn it over unless we're 01:29:03  
14 introducing it. 01:29:06

15 JUDGE NASTOFF: Well, before cross-examination 01:29:06  
16 they can have an opportunity to review it and if they 01:29:07  
17 have any cross questions on it they can do that and if 01:29:09  
18 you need a moment to do that, obviously we will give 01:29:11  
19 you time to do that. 01:29:13

20 MR. OSTER: Thank you, Your Honor. 01:29:14

21 A. Okay. (Reading) "I have never had any intent to 01:29:17  
22 conceal facts from you. Please believe that. The truth is, 01:29:23  
23 it's all shameful, embarrassing, unforgivable, regrettable. 01:29:27  
24 No one hurts more than myself for the women and their 01:29:31  
25 families. For years I have wanted to face them and 01:29:35

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1	apologize." And then he talks about how -- how that he hopes	01:29:37
2	that that might be achieved.	01:29:43
3	Q. Can you give -- do you have a date for that	01:29:47
4	letter?	01:29:50
5	A. Yes. That was March this year. It was just	01:29:51
6	dated --	01:29:55
7	Q. Is that the date on the letter or is that the post	01:29:57
8	mark date?	01:30:01
9	A. I'm sorry, this is the date on the letter. I	01:30:02
10	don't keep all of the envelopes, post marks.	01:30:06
11	Q. If the Judges were to determine that death was the	01:30:08
12	appropriate sentence, could you tell the Judges what impact	01:30:19
13	that would have upon you?	01:30:22
14	A. It would tear me apart. I can't -- can't imagine	01:30:26
15	being so far away, some thousands of miles away knowing that a	01:30:34
16	friend who I've, over the years have -- I have come to really	01:30:40
17	enjoy his company through letters, but I care about him and	01:30:44
18	the thought that if he has to go through that, if there is any	01:30:50
19	way to avoid that, any way to avoid his death. It would tear	01:30:58
20	me apart. I can't imagine life without seeing his letters	01:31:03
21	arrive.	01:31:07
22	Q. If -- I think we have discussed that if the Judges	01:31:11
23	do decide death is the appropriate sentence that he will have	01:31:15
24	a number of appeals. will that impact upon the communications	01:31:18
25	you have with him now?	01:31:23

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1 || A. Sorry, in what way? 01:31:25

2 Q. If the Judges impose a sentence of death, will 01:31:29

3 that cause you to change your communications? 01:31:32

4 A. No. No. He is my friend. Why would it? 01:31:35

5	Q. If on the other hand the Judges choose to impose a	01:31:40
6	sentence of life, will that impact your communications with	01:31:43
7	him?	01:31:49

8 A. No. I think I might be a bit happy. No. We 01:31:50  
9 would still write. I can't imagine us ever losing contact. 01:31:55

10	Q. You have mentioned Clark over time has provided	01:32:03
11	you with physical objects, for lack of a better term?	01:32:06

12	A. That's right, yes, he makes -- he spends a lot of	01:32:12
13	time making craft works. I have brought a piece of craft work	01:32:18
14	with me. A box I cherish and I've had and I use at home every	01:32:22
15	day. I don't know if you would -- I can show you that.	01:32:27

16 Q. Do you actually have that with you now? 01:32:29

17 A. I do, yes. 01:32:31

18 Q. Could you show that to the Judges? 01:32:33

19	MR. PORTER: And I understand the prosecution has	01:32:35
20	not seen the needle work, we don't plan on introducing	01:32:39
21	it as evidence.	01:32:42

22	MR. OSTER: I'm just curious, it's being shown all	01:32:43
23	over and we never even heard anything about a lot of	01:32:45
24	this stuff. At some point I think we need to have	01:32:47
25	knowledge that this is going happen.	01:32:49

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1	JUDGE NASTOFF: I understand. If that is an	01:32:51
2	objection it will be overruled at this point in time,	01:32:55
3	but noted.	01:32:58
4	MR. OSTER: Yes.	01:32:58
5	A. Thank you, sir.	01:32:59
6	Q. Can you show it to the Judges so they can --	01:33:03
7	A. I can. I'm sorry, one of the hinges got broken in	01:33:09
8	transit. It is made out of match sticks, it's got a little	01:33:13
9	drawer, I think it's beautiful and I keep trinkets, earrings	01:33:17
10	in it and it is just one of the mementos he sent me. He's	01:33:21
11	never -- there has never been anything of large monetary value	01:33:24
12	between us, I have never given him lots of money and he has	01:33:28
13	never sent me anything of monetary value, but this really	01:33:31
14	means a lot to me.	01:33:34
15	Q. Fran, do you have an opinion about the death	01:33:39
16	penalty?	01:33:42
17	A. Yes, I do.	01:33:42
18	Q. And in three words or less, I don't want you to --	01:33:44
19	but can you just tell the Judges just very briefly what it is?	01:33:47
20	A. I'm against the death penalty. That's it.	01:33:51
21	Q. Does that impact your -- in your opinion, does	01:33:56
22	that impact your testimony today?	01:34:00
23	A. No. No. Of course, no. I would tell the truth	01:34:03
24	no matter -- I would just explain what is what, no matter	01:34:08
25	what.	01:34:12

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1 MR. PORTER: If I could just have one minute, Your 01:34:29  
2 Honor. 01:34:32  
3 JUDGE NASTOFF: You may. 01:34:32  
4 Q. (BY MR. PORTER) I just have one question left, 01:34:37  
5 Your Honors. Do you have any statement you would like to make 01:34:39  
6 to the Judges with respect to sentencing? 01:34:48  
7 A. If there is any way -- if there is any way 01:34:56  
8 legally, any legal means that you can find in your books or 01:35:01  
9 your hearts, to turn the sentence into -- not to impose the 01:35:06  
10 death penalty again, I would be extremely grateful. I don't 01:35:12  
11 know what else to say. It means an awful lot. 01:35:20  
12 MR. PORTER: Thank you, Your Honors, I have no 01:35:29  
13 further questions. 01:35:31  
14 JUDGE NASTOFF: Who will be conducting cross? 01:35:32  
15 MR. OSTER: I will, Your Honor, but I would prefer 01:35:35  
16 to be able to look at the letter before. 01:35:36  
17 JUDGE NASTOFF: And if you need to look at the box 01:35:38  
18 as well, you can. 01:35:40  
19 MR. OSTER: That's fine. 01:35:43  
20 JUDGE NASTOFF: What I would indicate -- 01:35:44  
21 MR. OSTER: May I approach? 01:35:45  
22 JUDGE NASTOFF: You may. And retrieve that if you 01:35:46  
23 need a moment to look that over. If you are indeed 01:35:52  
24 going to engage in cross-examination, what I would 01:35:53  
25 recommend is that we make a photocopy of that, mark the 01:35:56

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1 photocopy as an exhibit and then you can cross. 01:35:38

2 MR. OSTER: Yes, Your Honor, thank you. Your 01:36:00  
3 Honor, I don't think I will ask a question verbatim as 01:37:28  
4 what is in the letter, I may cross-examination in 01:37:32  
5 general. 01:37:34

6 JUDGE NASTOFF: Do you think -- I don't think it's 01:37:34  
7 necessary that we mark it then. If you were going to 01:37:38  
8 ask her, as you would, like cross-examination on a 01:37:40  
9 statement type of thing we would mark it, otherwise I 01:37:42  
10 think you can just return it to her. 01:37:45

11 MR. OSTER: It may be general, but nothing 01:37:47  
12 verbatim or anything like a statement would be. 01:37:51

13 CROSS-EXAMINATION 01:37:55

14 BY MR. OSTER: 01:37:58

15 Q. My name is Michael Oster. I work for the State of 01:37:58  
16 Ohio in this matter. I'm just going to ask you a few 01:38:08  
17 questions. 01:38:10

18 A. Of course. 01:38:11

19 Q. First, in your research on this case, were you 01:38:11  
20 aware that Mr. Davis had never admitted to this crime before? 01:38:16

21 A. I was aware of various legal arguments. I'm not a 01:38:19  
22 lawyer. When I started reading through the Court reports, I 01:38:31  
23 have to say that I didn't understand an awful lot of them. 01:38:35

24 Q. But in your letter, he does admit to the crimes to 01:38:42  
25 you, correct? 01:38:46

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1	A. He says that he has never tried to hide anything	01:38:47
2	from me. We just haven't spoken about it. It has not been a	01:38:56
3	topic of conversation.	01:39:00
4	Q. And you said one topic of conversation you spoke,	01:39:01
5	I believe you referenced in the word cheeky and having	01:39:06
6	conversations about the Navy; is that correct?	01:39:09
7	A. That's right.	01:39:11
8	Q. What did he tell you about his time in the Navy?	01:39:12
9	A. How he traveled, he traveled the world. He never	01:39:14
10	got to London, that was the start of the conversation. He	01:39:17
11	went to -- he went to Barcelona, and I think he and his	01:39:22
12	friends had went out and enjoyed the town. I think they	01:39:29
13	probably maybe had a few beers, but just telling me about his	01:39:34
14	life.	01:39:39
15	Q. Did he tell you why he left the Navy?	01:39:40
16	A. No.	01:39:42
17	Q. Would it surprise you to know that he was	01:39:42
18	discharged for being not fit for duty from the Navy?	01:39:46
19	A. Surprise me? If that is the facts, that is the	01:39:49
20	facts.	01:39:55
21	Q. And you are a citizen of England; is that correct?	01:39:56
22	A. I am, yes.	01:40:00
23	Q. I know this is a question you are not supposed to	01:40:01
24	ask a lady but what year you were born?	01:40:04
25	A. 1964.	01:40:06

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1	Q. And 1964, in fact, was the last year there was	01:40:08
2	ever an execution in England, was it not?	01:40:15
3	A. I believe so. My whole life I haven't known the	01:40:18
4	death penalty.	01:40:21
5	Q. Your whole life you have never seen the death	01:40:22
6	penalty or its inner workings in England itself?	01:40:24
7	A. In my country, no. No, I am aware of the world.	01:40:28
8	I keep abreast of the world.	01:40:31
9	Q. And you're against the death penalty?	01:40:33
10	A. Yes, I am.	01:40:37
11	Q. And you are friends with Mr. Davis?	01:40:38
12	A. Yes, I am.	01:40:40
13	Q. And your entire country is against the death	01:40:41
14	penalty?	01:40:45
15	A. Oh, no.	01:40:45
16	Q. Your government has outlawed the death penalty,	01:40:46
17	correct?	01:40:49
18	A. There has been several votes throughout my life.	01:40:49
19	Q. Is it currently --	01:40:52
20	A. It is currently not on the statute books.	01:40:53
21	MR. OSTER: Thank you. That is all of the	01:40:56
22	questions I have, Your Honor.	01:40:58
23	JUDGE NASTOFF: Any further questions?	01:40:59
24	MR. PORTER: We have no additional questions.	01:41:01
25	Thank you for asking, Your Honor.	01:41:03

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1	JUDGE NASTOFF: All right. Any reason that she	01:41:09
2	shouldn't be released permanently from any subpoena or	01:41:07
3	do you anticipate any recall?	01:41:10
4	MR. PORTER: We don't anticipate recalling her.	01:41:11
5	We will, in fact, not be recalling her and we would,	01:41:14
6	since she has come a long way, ask the Court's	01:41:18
7	permission for her to remain in the courtroom.	01:41:20
8	JUDGE NASTOFF: Wish to be heard on that matter?	01:41:23
9	If she is released from her subpoena, I don't see any	01:41:27
10	reason to prohibit that.	01:41:30
11	MR. OSTER: Then we have no objection, Your Honor.	01:41:32
12	JUDGE NASTOFF: All right. You are released from	01:41:35
13	your subpoena. You are free to go about your business.	01:41:41
14	If you desire to stay in the courtroom, that is up to	01:41:43
15	you.	01:41:46
16	THE WITNESS: Thank you very much.	01:41:47
17	MR. PORTER: At this point we would like to	01:41:59
18	address the Court with respect to some evidentiary	01:42:01
19	matters with regard to some of the exhibits that are in	01:42:04
20	the notebook that the Judges have, Your Honors.	01:42:07
21	JUDGE NASTOFF: Okay.	01:42:10
22	MR. PORTER: Would first direct the Court's	01:42:19
23	attention to what would be Exhibit B in your notebook,	01:42:21
24	Your Honors.	01:42:24
25	JUDGE NASTOFF: Exhibit B.	01:42:26

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1	MR. PORTER: B as in boy. I'm sorry, Your Honor.	01:42:27
2	Okay.	01:42:38
3	JUDGE NASTOFF: Okay.	01:42:40
4	MR. PORTER: That is the death certificate of	01:42:41
5	Charles Flowers. The Court has and the prosecutor has	01:42:43
6	a copy. The original is on the bench before the Court	01:42:47
7	in front of Judge Spaeth. For purposes of some	01:42:52
8	admissibility issues that we anticipate coming up, we	01:42:57
9	would ask the Court to admit Exhibit B, which would be	01:43:00
10	the death certificate of Charles Flowers, Your Honor.	01:43:05
11	JUDGE NASTOFF: Okay. What is the purported	01:43:10
12	relevance of Exhibit B?	01:43:13
13	MR. PORTER: We -- Mr. Lee, John Lee will be the	01:43:15
14	next witness in this matter. Mr. Flowers is obviously	01:43:20
15	unable to testify since he is deceased. We are going	01:43:23
16	to be asking the Court, Mr. Lee, excuse me, Your Honor	01:43:26
17	had previously interviewed Mr. Flowers. It is our	01:43:33
18	intent to have Mr. Lee relate the interview he had with	01:43:37
19	Mr. Flowers. And Mr. Flowers' interview for the	01:43:41
20	Court's record would Exhibit G in the notebook before	01:43:48
21	the Court currently, Your Honors.	01:43:50
22	Your Honors, I may be going at this backwards so	01:44:19
23	let me try going at it a different way. Mr. Davis has	01:44:22
24	prepared a trial memorandum with respect to the	01:44:26
25	admissibility issue. I would ask the Court permission	01:44:30

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1 to then distribute the trial memorandum we prepared 01:44:34  
2 since it is actually tied into the death certificate 01:44:37  
3 issue. 01:44:40

4 JUDGE NASTOFF: Sure, if it its relevant to your 01:44:41  
5 motion to have Exhibit B admitted into evidence. 01:44:44

6 MR. PORTER: Court's permission to approach the 01:44:58  
7 bench, give the original to the court reporter. 01:45:01

8 JUDGE NASTOFF: That's fine. 01:45:04

9 JUDGE PATER: Is there any object -- has defense, 01:45:18  
10 or excuse me, has the State seen this material already? 01:45:19  
11 Is there any objection from the State? 01:45:23

12 MR. EICHEL: Yes, Your Honor. It is hearsay and 01:45:27  
13 unsworn, out-of-court statement, not subject to any 01:45:31  
14 cross-examination, if offered for the truth of the 01:45:36  
15 matter asserted. 01:45:39

16 JUDGE NASTOFF: Okay. Well, B is a certified copy 01:45:40  
17 of a public record, if we're talking about B. 01:45:42

18 MR. EICHEL: No, I am talking about -- its only 01:45:43  
19 purpose in being admitted as a death certificate is to 01:45:45  
20 get in Exhibit G which is hearsay. 01:45:49

21 JUDGE NASTOFF: All right. Let me read what's... 01:45:54  
22 all right. Did you have more that you wish to offer 01:49:36  
23 me? I imagine you've had time to read it. 01:49:47

24 MR. EICHEL: After reading the memorandum, it 01:49:51  
25 occurs to me that it depends on what the defense is 01:49:52

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1 offering this for. If it is offered as a social  
2 history that is going to come in and it forms a  
3 rational basis for the doctor's opinion, and that may  
4 be happening tomorrow or whenever, things like this are  
5 admitted all the time for that purpose, but what I  
6 object to is their stand alone being offered for the  
7 truth of the matter asserted as stand alone evidence.  
8 If it is social history upon which a doctor relied,  
9 there is no problem with it.

10 JUDGE NASTOFF: Okay.

11 MS. COOK-REICH: Your Honor, we would be  
12 presenting it for social history purpose. I believe  
13 Mr. Eichel is properly understanding that when our  
14 doctor testifies he will be going through this  
15 information and these people obviously were  
16 unavailable. The first one we discussed is dead, so we  
17 have obtained a certified copy of his death  
18 certificate.

19 JUDGE NASTOFF: All right. Well, is there any  
20 reason in particular to address this now then as  
21 opposed to in conjunction with the testimony of the  
22 doctor, or --

23 MR. PORTER: Could we have ten seconds to confer  
24 please, Your Honor?

25 JUDGE NASTOFF: Sure. We probably need ten

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1 seconds, too, so -- 01:51:09

2 MR. PORTER: I'm sorry, Your Honor. I don't mean 01:51:22  
3 to hold things up. 01:51:24

4 (Judges confer off the record.) 01:51:44

5 JUDGE PATER: Let me make just sure I understand, 01:51:53  
6 and perhaps that we understand, defense's statement, 01:51:55  
7 defense counsel's statement just a minute ago. Are you 01:52:00  
8 saying that you are willing for this to come in and for 01:52:02  
9 us to accept it, but not for the truth of the matter 01:52:06  
10 asserted, only for background to explain why the 01:52:10  
11 doctors have the opinions that the doctors have? 01:52:15

12 MR. PORTER: That is correct, Your Honor. 01:52:19

13 JUDGE PATER: Okay. 01:52:29

14 (Judges confer off the record.) 01:52:34

15 JUDGE NASTOFF: Was there something else? 01:52:56

16 MR. OSTER: Would it not be more proper then to 01:52:57  
17 wait and reserve ruling until the doctor stated that he 01:53:00  
18 used it in some form of social summary as opposed to 01:53:03  
19 now if the doctor is not here to testify anyway? 01:53:08

20 JUDGE NASTOFF: That is probably appropriate. We 01:53:10  
21 will take it under advisement, withhold ruling until 01:53:11  
22 the doctor testifies and subject to a tying in as 01:53:16  
23 indicated. We don't anticipate there being an issue 01:53:20  
24 for the purposes that have been stated, but we do want 01:53:23  
25 to, I guess, make sure that the doctor has, in fact, 01:53:28

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1	properly relied on these in forming his opinion.	01:53:33
2	JUDGE SPAETH: Is it going to be the same issue for	01:53:37
3	Elizabeth Crawford, Fannie Whiteside?	01:53:40
4	JUDGE NASTOFF: Yeah, and does that apply to every	01:53:41
5	one of these witnesses?	01:53:42
6	MR. PORTER: It does, Your Honor.	01:53:45
7	JUDGE NASTOFF: All right.	01:53:47
8	JUDGE SPAETH: Some of these witnesses -- I'm	01:53:47
9	sorry to interrupt --	01:53:50
10	JUDGE NASTOFF: Go ahead.	01:53:50
11	JUDGE SPAETH: Did some of these witnesses testify	01:53:51
12	at a prior mitigation hearing?	01:53:53
13	MR. PORTER: They have not, and let me clarify so	01:53:56
14	that the Judges do not believe that I misstated the	01:53:59
15	facts. We -- there are four witnesses involved here.	01:54:02
16	Two have died and the other two are incompetent, I'm	01:54:07
17	not too sure -- at least in our perception we have	01:54:12
18	submitted affidavits that we believe they are	01:54:16
19	incompetent. I didn't want the Court to believe all	01:54:20
20	four of them were deceased.	01:54:22
21	JUDGE PATER: And what we would be getting	01:54:25
22	testimony concerning would be Mr. Lee would be taking	01:54:25
23	the stand, and in essence saying, you know, I had this	01:54:26
24	conversation with Dr. Flowers. Did he have	01:54:29
25	conversations with the other three as well?	01:54:32

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1 MR. PORTER: He did, Your Honor. 01:54:33

2 JUDGE PATER: So he will be testifying as to all 01:54:35  
3 four of these people saying I had these conversations, 01:54:37  
4 these people did relate to me what I have set forth in 01:54:39  
5 my affidavit, or whatever this summary sheet of and 01:54:42  
6 then they are either dead or incompetent at this time, 01:54:46  
7 that would be the thrust of his testimony. 01:54:49

8 MR. PORTER: That would be, Your Honor. 01:54:53

9 JUDGE NASTOFF: All right. Thank you. We will 01:54:53  
10 have the matter under advisement until Dr. Lee's 01:54:55  
11 testimony with that understanding as to the purpose for 01:54:59  
12 which it has been proffered. 01:55:04

13 MR. OSTER: Let me just clarify, it's Dr. Smith. 01:55:05  
14 I believe Lee, with the last time is an Ohio Public 01:55:07  
15 defender investigator. 01:55:12

16 JUDGE PATER: Is he one of your staff guys? 01:55:13

17 MR. PORTER: Yes. 01:55:15

18 JUDGE PATER: So is he here now? Do you want him 01:55:16  
19 to be able to testify now and get out of here and then 01:55:17  
20 we will have the doctor later at some other day or 01:55:18  
21 something? 01:55:21

22 MR. PORTER: We have been advised we have another 01:55:22  
23 issue so we have no problem bringing him back if the 01:55:23  
24 Court needs to hear from him after Dr. Smith testifies. 01:55:26  
25 So rather than put the Court through testimony they may 01:55:29

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1 not need to hear, we would just reserve the right to 01:55:34  
2 call him on Thursday if that would be acceptable to 01:55:37  
3 Your Honors. 01:55:41

4 JUDGE NASTOFF: All right. Do you have anything 01:55:42  
5 else to present at this time then? 01:55:46

6 MS. COOK-REICH: No, Your Honor that would 01:55:48  
7 conclude what we have today ready. 01:55:49

8 JUDGE NASTOFF: All right. Can you give us just 01:55:51  
9 as a -- for scheduling purposes, an idea as to how many 01:55:53  
10 more witnesses and perhaps when they would be 01:56:02  
11 available? 01:56:06

12 MS. COOK-REICH: we have six witnesses, although 01:56:06  
13 we believe we have seven tomorrow, but at this point in 01:56:09  
14 time we have six and on Thursday, excluding Mr. Lee, we 01:56:12  
15 have four, that is when the doctor would be testifying. 01:56:19

16 JUDGE NASTOFF: Six witnesses tomorrow? 01:56:23

17 MS. COOK-REICH: Yes. 01:56:25

18 JUDGE NASTOFF: Four on Thursday? 01:56:26

19 MS. COOK-REICH: Yes, Your Honor. Dr. Smith 01:56:28  
20 couldn't come until Thursday. 01:56:31

21 JUDGE NASTOFF: All right. And would that 01:56:33  
22 conclude the evidence? 01:56:35

23 MS. COOK-REICH: I anticipate that concluding that 01:56:38  
24 day, yes. 01:56:42

25 JUDGE NASTOFF: And again for scheduling purposes, 01:56:42

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1	what times are these witnesses scheduled to be here?	01:56:44
2	MS. COOK-REICH: I have the persons coming	01:56:47
3	tomorrow all scheduled to be here in the morning.	01:56:49
4	Assuming no one has a problem with 9:00.	01:56:52
5	JUDGE NASTOFF: All right. And what about	01:56:59
6	Thursday?	01:57:00
7	MS. COOK-REICH: I know at least two of the	01:57:01
8	gentlemen will be here first thing in the morning at	01:57:03
9	9:00.	01:57:06
10	JUDGE NASTOFF: All right. Due to Judge Spaeth's	01:57:13
11	docket, we are going to -- if possible -- get started	01:57:18
12	at 10:00 a.m. on Thursday, so that you can warn those	01:57:24
13	witnesses.	01:57:27
14	MS. COOK-REICH: I might be able to move a couple	01:57:30
15	of them to Wednesday.	01:57:32
16	JUDGE NASTOFF: If you can do that, that would be	01:57:33
17	fine. All right. And then we can address any rebuttal	01:57:35
18	the State might have at the appropriate time. For now,	01:57:42
19	if there is no further evidence or testimony that you	01:57:46
20	wish to present today --	01:57:49
21	MS. COOK-REICH: No, Your Honor, we don't have any	01:57:50
22	additional.	01:57:53
23	JUDGE NASTOFF: All right. Then any objection to	01:57:53
24	recessing on this matter until 9:00 a.m. tomorrow	01:57:56
25	morning?	01:57:59

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1 MR. OSTER: Not from the State, Your Honor. 01:58:00

2 MR. PORTER: Nothing on behalf of Mr. Davis, Your 01:58:01

3 Honor. Thank you for asking. 01:58:04

4 JUDGE NASTOFF: All right. That will be the 01:58:05

5 order. 01:58:07

6 (Hearing concluded at this time to be reconvened 01:58:08

7 the following morning, September 9, 2009.) 01:58:17

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1 STATE OF OHIO )  
2 ) SS. REPORTER'S CERTIFICATE  
3 COUNTY OF BUTLER )

4 I, JILL M. CUTTER, RPR, an Official Court Reporter  
5 and Notary Public within the State of Ohio do hereby certify  
6 that the foregoing proceedings were taken in stenotype by me  
7 at the time and place herein set forth and thereafter reduced  
8 to typewritten form;

9 That the foregoing 73 pages constitutes a true and  
10 accurate transcript of the proceedings held, all done to the  
11 best of my skill and ability.

12 I further certify that I am not related to any of  
13 the parties hereto, nor am I in any way interested in the  
14 result of the action hereof.

15 IN WITNESS WHEREOF, I have hereunto set my hand at  
16 Hamilton, Ohio, this 22ND day of December, 2009.

17  
18  
19 

20 JILL M. CUTTER, RPR  
21 Official Court Reporter  
22 Butler County Common Pleas  
23 Hamilton, Ohio 45011  
24  
25

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IMAGED

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COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA-09-10-263

vs.

HONORABLE ANDREW NASTOFF

HONORABLE KEITH SPAETH

HONORABLE CHARLES PATER

VON CLARK DAVIS,

FILED BUTLER CO.  
COURT OF APPEALS

Defendant.

JAN 08 2010

ORIGINAL

CINDY CARPENTER  
CLERK OF COURT

MITIGATION HEARING

TRANSCRIPT OF PROCEEDINGS

September 9, 2009

VOLUME II

JILL M. CUTTER, RPR  
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20

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## I N D E X

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## Transcript of Proceedings

## Morning Session

\* \* \* \* \*

JUDGE NASTOFF: All right. We're again on record in State of Ohio vs. Von Clark Davis, CR1983-12-0614. The defendant, Von Clark Davis, is personally present again, accompanied by counsel, Randall Porter, Melynda Cook-Reich. Assistant prosecutors Dan Eichel and Michael Oster are present. The members of our panel present today are myself, and Judges Pater and Spaeth as well.

09:26AM

When we left off yesterday, we had concluded discussing the offer of admission of statements of Elizabeth Crawford, Charles Flowers, Milton Flowers and Fannie Whiteside. The Court had taken that under advisement, reserved ruling on that until further testimony was presented from the doctor I believe. And I believe that is where we left off. So at this time I would turn to the defense and ask if you have any further evidence or testimony that you would wish to present at this time?

09:26AM

MS. COOK-REICH: Yes, Your Honor, we would call Victor Davis to the stand.

JUDGE NASTOFF: All right. You may proceed.

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1 VICTOR DAVIS

2 having been first duly sworn, was examined and testified under  
3 oath as follows:

4 JUDGE NASTOFF: You may proceed.

5 MS. COOK-REICH: Victor, make sure you sit close  
6 enough or pull the microphone closer to you.

7 JUDGE NASTOFF: That entire microphone can move so  
8 you can slide that over closer.

9 DIRECT EXAMINATION

10 BY MS. COOK-REICH:

09:27AM

11 Q. For the record, can you state your name, please?

12 A. Victor Lee Davis.

13 Q. Okay. And Victor, where do you reside?

14 A. [REDACTED] Hamilton, Ohio.

15 Q. And Victor, you are one of Von Clark Davis'  
16 brothers; is that correct?

17 A. Yes, I am.

18 Q. Is he your older brother or younger brother?

19 A. He is an older brother.

20 Q. Older brother? And what year were you born?

09:28AM

21 A. 1950.

22 Q. And do you know what year Victor -- I'm sorry, Von  
23 was born?

24 A. '46.

25 Q. So he is four years older than you are?

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1 A. Yeah.

2 Q. Okay. Can you name your siblings in order of  
3 birth?

4 A. Yeah. Elliot, Von, Carol, Charles, and myself,  
5 and then Gregory, then Joanne, Michael, Lavonne, and Carlos.

6 Q. Okay. So Gregory died as an infant?

7 A. As an infant, that's correct.

8 Q. And he was born after you?

9 A. Yes.

10 Q. And you named Michael and Lavonne and Carlos also?

09:28AM

11 A. That's correct.

12 Q. And total there would have been ten children born  
13 to your mother; is that correct?

14 A. That's correct.

15 Q. Okay. Three of those children are the children of  
16 Charles Tipton and your mother, Alluster; is that correct?

17 A. That's correct.

18 Q. And Charles is your stepfather?

19 A. That's correct.

20 Q. Do you view him as a stepfather?

09:29AM

21 A. No.

22 Q. How do you view him?

23 A. I view him as a father.

24 Q. Okay. Of your mother's ten children, obviously we  
25 know Gregory is deceased, are there other children that aren't

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1 deceased?

2 A. Charles and Lavonne.

3 Q. Michael, Lavonne and Carlos all have Charles as a  
4 father, the other seven children of your mother's, are those  
5 all having the same father?

6 A. No.

7 Q. And who is your father?

8 A. My father is Nicholas Davis.

9 Q. Okay. That is Von's father also?

10 A. Yes, it is.

09:30AM

11 Q. Other than yourself and Von, are there -- which  
12 children have other fathers other than Charles and Nick?

13 A. Elliot and Carol.

14 Q. So Nick fathered Elliot, yourself, Von, Carol,  
15 what about Gregory?

16 A. And Gregory.

17 Q. Okay. So Charles Davis and Joanne have different  
18 fathers?

19 A. Yes.

20 Q. Do they have the same father?

09:30AM

21 A. No.

22 Q. Your biological father, do you recall how old you  
23 were when he left your household?

24 A. I was -- I -- it was prior to five years of age,  
25 and I would think it was probably three to four years of age

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1 when he left.

2 Q. After he left your household, do you recall, do  
3 you have any memories of him?

4 A. Vague.

5 Q. Vague memories?

6 A. And I saw him one other time after he left.

7 Q. And what was that occasion for?

8 A. He had returned to Hamilton, Ohio and was at my  
9 great grandmother's home. I don't know the reason he was  
10 there.

09:31AM

11 Q. And you visited with him at that time?

12 A. Briefly.

13 Q. Did the rest of Nick's children visit him at that  
14 time?

15 A. At the time I visited him, it was only Elliot, my  
16 oldest brother and my brother Von.

17 Q. Do you know what year your mother and Charles were  
18 married?

19 A. I couldn't give you the exact date, it was  
20 approximately 50 years ago.

09:31AM

21 Q. Okay. Do you know how old you were?

22 A. That would make me approximately nine.

23 Q. Okay. Before your mother and Charles met, do you  
24 know where your family lived and who they lived with?

25 A. Absolutely.

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1 Q. Who?

2 A. I can tell you my whole family history. We lived  
3 prior to their meeting?

4 Q. Yes.

5 A. We lived on [REDACTED] and we moved to

6 [REDACTED]

7 Q. All within the City of Hamilton?

8 A. That's correct.

9 Q. Would you say that up until the time that your  
10 mother and step-father moved to the Forest Park area that your  
11 family primarily lived in Hamilton?

09:32AM

12 A. That's correct.

13 Q. Okay. Who did you live with as a family prior to  
14 Charles?

15 A. Who did I live with?

16 Q. Yes, who did you live with?

17 A. I lived with my mother, and my siblings and it was  
18 an extended family. My grandmother, her sister, my great  
19 aunt, her eldest sister, my grandmother's eldest brother, and  
20 his wife, we had a large home on [REDACTED]

09:32AM

21 Q. Okay. At some point in time your mother and the  
22 other children moved from the residence of your grandmother;  
23 is that correct?

24 A. That's correct.

25 Q. Did you remain in the home of your grandmother?

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1 A. Yes.

2 Q. How long did you live with your grandmother?

3 A. Until she died.

4 Q. And when was that?

5 A. '86. Well, in '86 she passed. She had been in  
6 the nursing home several years prior to her passing.

7 Q. Are you the only Davis or Tipton child that  
8 resided with your grandmother for that extended period of  
9 time?

10 A. Yes, on a permanent basis. I shouldn't even say  
11 that. I was between -- I was mostly with my grandmother. I  
12 guess you could say I was the favorite or the spoiled.

09:33AM

13 Q. Okay. Could you describe the type of income areas  
14 that your family lived while you were growing up?

15 A. Working class.

16 Q. Okay. Were any of your family members drinkers?

17 A. Sure.

18 Q. Would you describe them as social or otherwise?

19 A. Which family are you talking about? Extended or  
20 immediate?

09:33AM

21 Q. Extended family?

22 A. Out of my extended family, I had some uncles that,  
23 some folk may classify alcoholics, but functional. They  
24 worked every day.

25 Q. Okay. And what about your immediate family?

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1           A.    Immediate family, there was some drinking, but not  
2   excessive.

3           Q.    And by not excessive, it is less than drinking  
4   every day?

5           A.    Oh, yes.

6           Q.    Enough to go to work. Victor, what is your  
7   education level?

8           A.    I have a -- graduated from the Hamilton Public  
9   Schools. I have a Bachelor's degree from Central State  
10   University. I have a Master's degree from Miami University.  
11   I have extended studies from Cincinnati Seminary, which is now  
12   Cincinnati Christian College. And I have hundreds and  
13   hundreds of continuing education hours at several universities  
14   and grants through the State.

09:34AM

15          Q.    And how are you employed?

16          A.    I am currently have, well, three jobs. Full-time  
17   job as a mental health therapist at Children's Home of  
18   Cincinnati. I am a pastor of St. Paul AMA Church, and I am  
19   visiting teacher at Miami University. I am an instructor,  
20   spring course at Miami University, Hamilton.

09:35AM

21          Q.    Are you the only Davis sibling that went onto  
22   higher education to the extent that you have?

23          A.    To the extent that I have, yes.

24          Q.    Do you have any memories of, significant memories  
25   of Von growing up?

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1 A. Yes.

2 Q. Okay. Even though you lived with your grandmother  
3 primarily?

4 A. Well, that is combined. The first, roughly nine  
5 years we were all together. And then my mother and my father,  
6 Charles Tipton, moved out into an apartment. And I was back  
7 and forth, but yes I have extensive memory.

8 Q. What type of relationship would you say that you  
9 and Von had growing up?

10 A. Average. And that you would with the difference  
11 in age. I got on his nerves, he got on mine. I was the  
12 little brother trying to tag behind him.

13 Q. Okay. How would you have described Von growing  
14 up, standoffish or close or someone who was gregarious?

15 A. To the public?

16 Q. To his family?

17 A. Oh, very outgoing. Very gregarious.

18 Q. What about to the public?

19 A. Same.

20 Q. Did he seem to be close with any particular family  
21 member?

22 A. No more than, I think -- because he was older  
23 probably, he and my oldest brother and my oldest sister.

24 Q. Carol and Elliot?

25 A. Yes, Carol and Elliot.

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1 Q. Do you know the family name of Ernestine, her  
2 maiden name?

3 A. Franklin.

4 Q. Okay. Von had two children with Ernestine or two  
5 children that were born during his marriage with Ernestine; is  
6 that correct?

7 A. Yes.

8 Q. And their names are?

9 A. Sherry and Michelle.

10 Q. Are you aware whether Von is the biological father  
11 of those two children?

09:37AM

12 A. I didn't take the DNA test. I can only go by what  
13 she said and what he said.

14 Q. Okay. And what is that?

15 A. That Sherry is his biological daughter, and  
16 Michelle was not.

17 Q. Von has been in prison for a large amount of his  
18 life?

19 A. That's correct.

20 Q. Have you kept up a relationship with von at all  
21 during those years?

09:37AM

22 A. Yes.

23 Q. How have you kept up that relationship, writing,  
24 talking, visiting?

25 A. Telephone calls and letters.

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1 Q. Is he meaningful to you?

2 A. And visits initially.

3 Q. And visits initially?

4 A. Yes.

5 Q. Is he meaningful to you?

6 A. Is he meaningful?

7 Q. Meaningful to you. As a brother, is he meaningful  
8 to you?

9 A. Absolutely.

10 Q. You're obviously aware that we are here on a third  
11 resentencing of Von to determine whether these three Judges  
12 will impose death?

09:38AM

13 A. I understand that.

14 Q. What can you tell these three Judges that is  
15 important about Von that might make them choose a decision  
16 other than death?

17 A. Well, that is important about him. Should I  
18 address the Judges?

19 Q. Yes.

20 A. Pardon me, I am not trying to be casual, I have  
21 some pain. He is important first because he is my brother.  
22 Spiritually or religiously I would say he is a child of God.  
23 He has always, to me, accepted the responsibility of his  
24 actions. Never denied them to me. Has expressed to me that  
25 he has been hurt and remorseful from the time of his actions.

09:39AM

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1 That he has always attempted to right himself in the face of  
2 those who would accept it, and to God. Has always expressed  
3 to me that how hurt he was that he brought hurt upon two  
4 families, excluding his own; three including his own, the  
5 family of victims and his own family. And to me, that is the  
6 sign of a man or a person who has come to grips with the  
7 reality of his actions. Has never attempted to put the blame  
8 on anyone other than himself. And I believe that he is worthy  
9 of consideration. Has, over the years, been active and  
10 creative in what was allowed through the penal institutions.  
11 Has rather than waste time by simply being incarcerated, has  
12 tried to make the most of it through maintaining family  
13 contacts, social contacts, and contacts with those who have  
14 played a major part in his life outside of the immediate  
15 family. And shared a spiritual awakening that took place over  
16 the time that he has been incarcerated. And I think that is  
17 worthy of consideration.

09:41AM

18 Has never tried to convince me of anything other  
19 than the fact that he was man enough to know that he was  
20 wrong, but to accept the consequences without trying to place  
21 blame or redirect it. That is the best that I can do.

09:42AM

22 Q. And you phrased, you used a specific phrase about  
23 Von expressing his guilt and his remorse to you?

24 A. Yes.

25 Q. That is between two brothers; is that correct?

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1 A. Yes.

2 MS. COOK-REICH: I have no further questions for  
3 you. Thank you.

4 JUDGE NASTOFF: Cross-examination?

5 CROSS-EXAMINATION

6 BY MR. EICHEL:

7 Q. Good morning, Mr. Davis.

8 A. Good morning.

9 Q. I believe you said you were born in 1950; is that  
10 correct?

09:43AM

11 A. That's correct.

12 Q. You would be age 59 today?

13 A. Fifty-nine in July.

14 Q. July, a year or so you are contemporary of mine.

15 A. Okay.

16 Q. And you have lived in Hamilton virtually your  
17 whole life?

18 A. That is correct.

19 Q. In this area. And you're known as a community  
20 leader; is that correct?

09:44AM

21 A. Yes.

22 Q. And could you tell us, what have you been -- what  
23 titles or positions have you held as a community leader here,  
24 employment? I believe there was a community center that you  
25 were head of; is that correct?

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1 A. Uh-huh.

2 Q. Booker T. Washington Community Center?

3 A. Uh-huh.

4 Q. How long did you do that?

5 A. You want a list of positions I've held in the city  
6 and titles, is that what I understand you to say?

7 Q. Yeah, just briefly. We don't need to list  
8 everything.

9 A. Well, I have been executive director of Butler  
10 County Head Start as well as assistant director of Butler  
11 County Community Action Commission. I was second and fourth  
12 ward, I was co-creator of second and fourth ward outreach  
13 program, and most recent position here was executive director  
14 of Booker T. Washington Community Center. And as far as  
15 social organizations or civil rights organizations, I've been  
16 the director or president of several, including the NAACP, I  
17 have been on a merits task force for racism, the vice mayor's  
18 task force and I have held many, many positions through  
19 organizations.

09:44AM

20 Q. And as a family I believe you testified that you  
21 are supportive of your brother?

09:45AM

22 A. Yes.

23 Q. All of the members of your family are like  
24 yourself, supportive of Mr. Davis?

25 A. Well, I can only speak for me.

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1 Q. Okay.

2 A. I assume -- I would like to think my whole family  
3 is supportive, but I am supportive.

4 Q. Okay. And you were in Hamilton during the 1984  
5 trial, were you not?

6 A. Yes, I was.

7 Q. And supportive of Mr. Davis at that time?

8 A. Yes.

9 Q. Now, I noticed in your direct testimony you said  
10 he never put blame on anyone else. Quote, never put blame on  
11 anybody else. Are you aware that --

09:46AM

12 A. I said to me. Directly to me.

13 Q. You said it two different ways in your direct  
14 testimony, sir.

15 A. Well, if you could have it read back I will be  
16 glad to listen.

17 Q. If that is possible. I would like to find the  
18 place where he said he never put blame on anybody else.

19 (Pending question was read by court reporter.)

20 Q. Sir, is that correct?

09:47AM

21 A. When he was talking to me. That is what I was  
22 addressing the judges. Ms. Cook asked me our relationship.  
23 Now, we had, so that I can clear it up. He had placed blame,  
24 he had mentioned someone else, but when I talked to him -- she  
25 was asking our relationship.

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1 Q. Okay. But you are aware, are you not, that in the  
2 trial in 1984, he --

3 A. He mentioned someone, yes.

4 Q. He laid out a story that he gave that gun in  
5 exchange for, supposed exchange for dental equipment to a  
6 Silkey Carr, and that man was last seen with Suzette Butler  
7 outside the American Legion where she ended up dead and he  
8 walked to his car, he didn't even stop walking from the  
9 Legion, he walked to his car, got in his car and drove to  
10 Middletown?

09:48AM

11 A. I can only share what he said to me. I was not  
12 present, if you look at any records, I was not present at that  
13 entire trial, so I cannot tell you what he said at that trial.

14 Q. So --

15 A. I do know --

16 Q. You are not aware --

17 A. I do know of that name, yes.

18 Q. You do know -- you are aware that he said that?

19 A. Yes, I am.

20 Q. Did he explain to you?

09:48AM

21 A. No.

22 Q. Never gave an explanation to you as to why he  
23 would say that?

24 A. No.

25 Q. As far as living together, you and he are -- have

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1 the same father and same mother?

2 A. Correct.

3 Q. Lived in the same house growing up?

4 A. Part of the time.

5 Q. Part of the time. Well, let's take it from the  
6 time of his birth you were -- the time of your birth, as far  
7 as you know, as a child, you grew up and he was in your house  
8 until at least by the time your mother and Mr. Tipton married?

9 A. Yes.

10 Q. All those --

09:49AM

11 A. And even further, we still lived together. When  
12 my mother moved. My mother and my father moved into their own  
13 home, yes.

14 Q. And after that marriage, did you and Mr. Tipton  
15 have a good relationship?

16 A. Did me and Mr. Tipton have a good relationship?

17 Q. Yes.

18 A. Absolutely.

19 Q. And to your knowledge, was it the same with Von?

20 A. To my knowledge, yes.

09:50AM

21 Q. Okay. To your witness as to being in that same  
22 household, the best of your ability, it was the same?

23 A. Yes.

24 Q. Okay. And as I said you were a working class  
25 family?

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1 A. That's correct.

2 Q. And basically made the best way you could?

3 A. Yes.

4 MR. EICHEL: All right. Thank you very much, sir.

5 JUDGE NASTOFF: Any redirect?

6 MS. COOK-REICH: Yes.

7 REDIRECT EXAMINATION

8 BY MS. COOK-REICH:

9 Q. Victor, Mr. Eichel was asking you some questions  
10 about having lived in the same home with Von. I believe you  
11 phrased it that you were the family favorite?

09:50AM

12 A. Well, I like to think that. My grandmother -- I  
13 stayed with my grandmother and great aunt. My mother did not  
14 relinquish custody with -- no legal issues. I just stayed  
15 with them and when my mother wanted me to come home to be with  
16 the brothers and sisters, I had to go.

17 Q. Okay. Did you call your grandmother, grandmother?

18 A. I called her mamma. In fact, her name was mamma,  
19 we called her Mamma Vic. Her name was Victoria.

20 Q. Did there ever come a time when -- you just talked  
21 about if your mom said you were going to come home and stay  
22 with the rest of the siblings, you did so?

09:51AM

23 A. Oh, absolutely.

24 Q. Were there times that that was used as more of a  
25 if you don't keep in line you are going to come stay with us?

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1 A. Absolutely.

2 Q. Could you give a percentage amount of time that  
3 you lived with your grandmother versus your mother and the  
4 rest of the siblings?

5 A. I lived with my grandmother, I would say, it is a  
6 rough estimate, 75 percent of the time.

7 MR. EICHEL: No further questions. Thank you.

8 JUDGE NASTOFF: Anything further?

9 MR. EICHEL: No other questions.

10 JUDGE PATER: Before Mr. Davis stands down, let me  
11 put something on the record. I know when we judges  
12 conduct jury trials, we are having the voir dire  
13 process, we typically I think all of us probably  
14 typically ask the prospective jurors that is the fact  
15 finders, we are the fact finders now, we ask them if  
16 they know any of the witnesses or the attorneys will  
17 ask them those questions to see if there is any reason  
18 that a juror, potential fact finder, might be swayed by  
19 one witness or another witness, or a party or an  
20 attorney or whatever. I didn't know who the witnesses  
21 were going to be at the trial today and I have known  
22 Victor Davis for a long, long time. He and I are  
23 friends, I would be so presumptuous as to say I think  
24 he would concur with that. I have known him since high  
25 school days and we are good friends, but I do think I

09:52AM

09:52AM

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1 can fairly and impartially decide this matter, so I  
2 just wanted to put that on the record.

3 JUDGE NASTOFF: Does anyone want -- well, we don't  
4 need Mr. Davis up here for that. Is there any further  
5 testimony needed from Mr. Davis then?

6 MS. COOK-REICH: No, Your Honor.

7 JUDGE NASTOFF: May he be permanently released  
8 from any subpoenas?

9 MS. COOK-REICH: Yes, Your Honor.

10 JUDGE NASTOFF: All right. Mr. Davis, you are  
11 released from any subpoenas. Your testimony is  
12 complete. You are free to go about your business.  
13 Thank you.

09:53AM

14 THE WITNESS: Thank you very much.

15 JUDGE NASTOFF: All right. And then before you  
16 call your next witness, I just want to address...  
17 before the next witness is called, I just wanted to  
18 invite either counsel if you feel any further voir dire  
19 of Judge Pater, regarding his knowledge of Mr. Davis is  
20 necessary or warranted, I think now would probably be a  
21 good time to do that. Anything from the State?

09:53AM

22 MR. EICHEL: No, Your Honor. I appreciate knowing  
23 a little bit personally about Judge Pater's went to  
24 school with my wife. So I sort of knew that he went to  
25 Garfield High School same time, same age as the

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1 witness, so I appreciate the Judge making the comment  
2 and I have no question about it.

3 JUDGE NASTOFF: All right. Any questions from the  
4 defense, do you wish to voir dire Judge Pater further  
5 on that issue?

6 MR. PORTER: Mr. Davis has none and we thank the  
7 Judge for his candor.

8 JUDGE NASTOFF: All right. Just equally, I will  
9 indicate that I am not familiar with Mr. Davis and I am  
10 not sure if you are.

09:54AM

11 JUDGE SPAETH: Well, I have heard his name over  
12 the years. I am not personally familiar with him, but  
13 I know that he was involved in various community  
14 organizations. This is Judge Spaeth for the record.  
15 And so outside of that. I have had no personal  
16 dealings with the witness, Mr. Davis.

17 JUDGE NASTOFF: All right. And I would make the  
18 same caveats, I am obviously familiar with his  
19 reputation in the community but I just don't know him  
20 personally. And just so the record is clear, Judge  
21 Pater, you believe that you can weigh the testimony of  
22 the last witness by the same rules that you would apply  
23 to any other witness who testified in this proceeding?

09:55AM

24 JUDGE PATER: Yes, I do.

25 JUDGE NASTOFF: All right. And the same for you,

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1 Judge Spaeth?

2 JUDGE SPAETH: Absolutely.

3 JUDGE NASTOFF: And myself as well. All right.  
4 You may proceed.

5 MS. COOK-REICH: Next call Sherry Davis.

6 SHERRY DAVIS

7 having been first duly sworn, was examined and testified under  
8 oath as follows:

9 JUDGE NASTOFF: Ma'am, if you could just make sure  
10 as you testify that you speak into the microphone and  
11 you can move it around if need be. It slides. We just  
12 need to make sure that we are able to hear you as you  
13 speak. You may proceed.

09:56AM

14 DIRECT EXAMINATION

15 BY MS. COOK-REICH:

16 Q. For the record, please state your name, please?

17 A. Sherry Davis.

18 Q. And Sherry, where do you reside? where do you  
19 live?

20 A. Cincinnati, Ohio.

09:56AM

21 Q. Okay. Do you know the man seated over here to my  
22 right in the tan shirt?

23 A. Yes, I do.

24 Q. And who is he?

25 A. He is my father.

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1 Q. I hate to ask this, how old are you?

2 A. I am 41.

3 Q. Would it be fair to say, Sherry, that most of your  
4 life, your father has been incarcerated?

5 A. That's correct.

6 Q. Okay. And how would you describe your  
7 communication with Von?

8 A. We have a strong bond.

9 Q. Okay. Do you visit him?

10 A. I do.

09:57AM

11 Q. Do you write with him?

12 A. I am sorry?

13 Q. Do you write with him?

14 A. Yes, I do.

15 Q. Do you talk to him on the phone?

16 A. I do.

17 Q. Sherry, do you have children?

18 A. Yes, I do.

19 Q. How many?

20 A. I have two.

09:57AM

21 Q. Boys or girls?

22 A. Two boys.

23 Q. Sherry, your mother was Ernestine Davis; is that  
24 correct?

25 A. That's correct.

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1           Q. You have had limited contact with your father  
2 because he has been in prison these many years. Is he  
3 meaningful to you despite that limited contact?

4           A. Meaningful as in?

5           Q. Does he have meaning to you?

6           A. Yes, he does.

7           Q. Can you tell me what that is?

8           A. He is my father.

9           Q. He killed your mother?

10          A. Yes.

09:58AM

11          Q. For some that would be a hard hill to overcome?

12          A. It was very hard. It was very hard. It was a  
13 burden that I carried for a long time.

14          Q. You are aware that this three-judge panel is going  
15 to determine whether the sentence of death is an appropriate  
16 sentence again for your father?

17          A. I am aware of that.

18          Q. All right. Is there anything you would like to  
19 tell the three-judge panel that might encourage them not to  
20 impose that death sentence?

09:58AM

21          A. Over the years, growing up, I have held -- it was  
22 almost like a grudge, you know, I want to say it was a little  
23 hatred, you know, a lot of grievance there, but I have  
24 forgiven him even though this was my mother. I have forgiven  
25 him, that is just something I don't want to carry that

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1 anymore. And it has drawn the two of us together. We do, you  
2 know, again, have a strong bond. And I have had my mother  
3 taken away from me. I would not like to see my father taken  
4 away from me as well.

5 Q. If he were given one of the life sentences and  
6 never got out of prison, would you continue to have a  
7 relationship with him?

8 A. Yes, I would.

9 Q. Continue to write him?

10 A. Yes, I would.

09:59AM

11 Q. Talk with him?

12 A. That's correct.

13 MS. COOK-REICH: No further questions.

14 JUDGE NASTOFF: All right. Any cross-examination?

15 MR. OSTER: If we may have just one second, Your  
16 Honor.

17 JUDGE NASTOFF: Sure.

18 MR. OSTER: Thank you, Your Honor.

19 JUDGE NASTOFF: You may proceed

20 CROSS-EXAMINATION

09:59AM

21 BY MR. OSTER:

22 Q. My name is Michael Oster, I'm an assistant  
23 prosecutor here in Butler County. I just wanted to ask you a  
24 couple of questions. How many siblings do you have?

25 A. I have two.

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1 Q. You have two?

2 A. That's correct.

3 Q. Okay. So there is more than just you and  
4 Michelle, correct?

5 A. Well, there were three of us. And one of them has  
6 passed away.

7 Q. You had a brother his name was Tony; is that  
8 correct?

9 A. That's correct.

10 Q. Okay. So if someone said there was only you and  
11 Michelle that would be an incorrect family history?

10:00AM

12 A. Yes.

13 Q. Okay. And when did you first start having contact  
14 with your father, Mr. Davis?

15 A. I was a young teenager I was actually in junior  
16 high school when I first started communicating with him, so I  
17 would say I was about 13.

18 Q. Do you remember what years that was?

19 A. '81, somewhere around there, maybe. '80.

20 Q. Okay. And was that limited contact at that point?

10:01AM

21 A. Yes, it was.

22 Q. Okay. And when would you say you first started  
23 having an expanded relationship with him, was that recently?

24 A. No. I would say it's over the past fifteen years.

25 Q. And so when was the first time you had visited him

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1 face-to-face?

2 A. I don't remember when it was. It's been quite a  
3 while.

4 MR. OSTER: That's all the questions we have, Your  
5 Honor.

6 JUDGE NASTOFF: Any further direct examination, or  
7 redirect I should say?

8 MS. COOK-REICH: No, Your Honor.

9 JUDGE NASTOFF: All right. And again, this  
10 witness can be permanently released?

10:02AM

11 MS. COOK-REICH: Yes.

12 JUDGE NASTOFF: All right. Ma'am, your testimony  
13 is complete, you are released from any subpoenas and  
14 are you free to go about your business, thank you.

15 THE WITNESS: Thank you.

16 MS. COOK-REICH: If I could have a second to make  
17 sure another witness is out here.

18 JUDGE NASTOFF: That's fine.

19 MS. COOK-REICH: Your Honor, we call Charles  
20 Tipton.

10:03AM

21 CHARLES TIPTON  
22 having been first duly sworn, was examined and testified under  
23 oath as follows:

24 JUDGE NASTOFF: Sir, as you testify, if you could  
25 just make sure that that microphone is reasonably close

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1 and you can move it around, you can move the base.

2 THE WITNESS: Thank you.

3 JUDGE NASTOFF: All right. You may proceed.

4 DIRECT EXAMINATION

5 BY MS. COOK-REICH:

6 Q. State your name for the record, please?

7 A. Charles Tipton.

8 Q. And Mr. Tipton, where do you live?

9 A. I live in Forest Park.

10 Q. And who lives there with you?

10:04AM

11 A. My wife, and daughter.

12 Q. Okay. Which daughter?

13 A. Carol.

14 Q. Okay. And that is actually your stepdaughter?

15 A. That is my stepdaughter also, yes.

16 Q. You previously testified at Von's mitigation in

17 1984; is that correct?

18 A. Yes, I did for a few seconds.

19 Q. And just for the record, the man seated over here

20 to the right in the tan shirt is?

10:04AM

21 A. That is Von, Red Davis.

22 Q. Red is a nickname of his?

23 A. Yes, it is.

24 Q. Do you call him by Red?

25 A. I call him by Red.

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1 Q. okay. I will try to do that so that I don't  
2 confuse you.

3 A. Thank you.

4 Q. How old are you?

5 A. I am 77.

6 Q. And are you married to Von's mother?

7 A. I am.

8 Q. And her name is?

9 A. Alluster Tipton.

10 Q. And I am going to ask you how old is she?

10:05AM

11 A. She is 83.

12 Q. Because I don't want to ask her.

13 A. Thank you.

14 Q. When did you get married to Alluster?

15 A. We got married August 5th, 1962.

16 Q. And I would tell her you were very quick with that  
17 answer, you knew the date and the year.

18 A. Thank you.

19 Q. If Von was born in 1950 how old would he have been  
20 when you and his mother married?

10:05AM

21 A. well, I can only guess that Von was about nine or  
22 ten, somewhere along in that age.

23 Q. Before you and your wife married, did Alluster  
24 live with her mother?

25 A. Yes, she did.

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1 Q. Okay. With the other siblings, with her other  
2 children?

3 A. Yes, she did.

4 Q. Do you know who else lived in that household?

5 A. No, I really don't.

6 Q. Okay. You are familiar with the name Nick Davis?

7 A. Yes, I am.

8 Q. Okay. Who is that, or who was that?

9 A. That is the father of Von and his siblings.

10 Q. Okay. And did you know Nick Davis?

10:06AM

11 A. I knew him per se as a person in the neighborhood  
12 when they were all -- we were all growing up, I knew him.

13 Q. Okay. Did you know Nick to be a drinker?

14 A. No, not really. I didn't associate with him to  
15 that extent.

16 Q. After -- you and Alluster have three children  
17 together; is that correct?

18 A. That is correct.

19 Q. Okay. So Alluster, including her son Gregory who  
20 died as an infant, has ten children?

10:06AM

21 A. That's correct.

22 Q. The three children that you have together, Michael  
23 is the oldest; is that correct?

24 A. Michael is the oldest.

25 Q. Where does he reside?

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1           A.   Michael now is in a halfway house somewhere in  
2 Cincinnati.

3           Q.   He had previously been to prison?

4           A.   Yes, he has.

5           Q.   And your second child, or your middle child,  
6 Lavonne?

7           A.   She was killed in a train accident.

8           Q.   And what about Carlos, the third child?

9           A.   Carlos is now working for the State in Kentucky.

10          Q.   Is there any activity -- let me rephrase. Von has  
11 been in prison a large number of years; is that correct?

10:07AM

12          A.   That is correct.

13          Q.   Okay. Prior to him going to prison, did you and  
14 Von share any particular activity that you liked to do  
15 together?

16          A.   Oh, yes, we were fishermen.

17          Q.   You were fishermen?

18          A.   We were fishermen.

19          Q.   Would you say that that brought you closer?

20          A.   Yes, we were very close. We were very, very close  
21 and we'd go fishing every Saturday. We never missed a  
22 Saturday.

10:07AM

23          Q.   And what would you guys talk about when you went  
24 fishing?

25          A.   Oh, the one that got away.

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1 Q. Fishermen talk?

2 A. And hurry up and come on. Just little things,  
3 nothing much, nothing personal. Just we'll be glad when we  
4 get a bite.

5 Q. Did you guys talk about fishing topics, but not  
6 personal issues?

7 A. No, we never talked personal issues.

8 Q. Okay. You're obviously aware that these three  
9 Judges seated here are going to decide whether to impose the  
10 death sentence on Von?

10:08AM

11 A. Yes, I am.

12 Q. Is Von meaningful to you?

13 A. Von is very meaningful to me: Growing up, he was  
14 a child that every parent would want to have. Never a day in  
15 trouble. He would clean every Saturday. The house, the  
16 windows, but on the end was a reward, can I use the car.  
17 Other than that, he was a very good child growing up.

18 Q. While Von has been on death row for 25 years, have  
19 you visited with him or exchanged mail or calls?

20 A. I visited him when I was able to. When I got to I  
21 am not able to travel any distance over thirty minutes.

10:09AM

22 Q. He is much farther than thirty minutes away?

23 A. That is correct.

24 Q. His mother Alluster has some health issues also?

25 A. Very.

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1 Q. Does she have health issues that do not allow her  
2 to go visit him?

3 A. No, it is not that they don't allow her. But she  
4 has emphysema, asthma, she is on oxygen 24/7, so she can't  
5 make them long journeys.

6 Q. Despite not visiting with him, do you exchange  
7 mail, do you write to him?

8 A. Yes, I write to him, he writes to me, and we cover  
9 all kind of little topics and subjects, and fishing is among  
10 that group I guarantee you.

10:10AM

11 Q. Would you ask this Court to impose the death  
12 sentence or one of the life sentences?

13 A. My own feeling I would love to see the life  
14 sentence. I am like every parent, I love my children. They  
15 do bad, they have to pay the penalty and the consequences, but  
16 other than that, I still want to see him living.

17 Q. Even though you -- even if a life sentence is  
18 imposed he is probably never going to get out of prison?

19 A. Yes.

20 Q. You will never be able to fish together?

10:10AM

21 A. No, we won't, but we can still talk and  
22 communicate.

23 MS. COOK-REICH: I have no further questions.

24 Thank you.

25 JUDGE NASTOFF: Any cross-examination?

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1 MR. EICHEL: Just a few things.

2 CROSS-EXAMINATION

3 BY MR. EICHEL:

4 Q. One follow-up on one thing, Mr. Davis, good  
5 morning.

6 A. Tipton.

7 Q. When you said he would clean the house every  
8 Saturday at the end of it his question was always can I use  
9 the car?

10 A. Well, most likely that was a reward, yes.

10:11AM

11 Q. And most likely or was it always, if he -- if it  
12 pleased you gave him the car?

13 A. Yeah, I gave him the car for a few hours. He  
14 would bring it back.

15 Q. He was a close son, he considers you dad and you  
16 consider him son?

17 A. That is correct. Even though they were my  
18 stepchildren, I didn't utilize that word when we were  
19 together, it was always son and daughter.

20 Q. Right.

10:11AM

21 A. Family.

22 Q. And like you feel with any of your children,  
23 stepchildren or otherwise, they are your children?

24 A. They are my children.

25 Q. Right. Now, Nick Davis was moved and out of the

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1 picture years before you came into the picture; is that  
2 correct?

3 A. That is correct.

4 Q. And if your -- are you saying Von was about nine  
5 or ten when you came into the picture?

6 A. Well, he was about nine or ten when I came into  
7 the picture. We didn't get married right away. We dated for  
8 a few years.

9 Q. Mr. Tipton, I am assuming you're retired today?

10 A. No. I am working in security, I still have plans,  
11 children went to college, I try to help with their expenses so  
12 I went back to work, retired in 1990.

10:12AM

13 Q. And in the 1960's, '70's, what was your occupation  
14 then?

15 A. I was an employee of the General Electric Company  
16 in the industrial division, I was in customer service.

17 Q. And you're basically a working man?

18 A. Yes, sir, I surely am.

19 Q. Okay. All right. No other questions I have.

20 Thank you, sir.

10:13AM

21 THE WITNESS: Thank you, sir.

22 MS. COOK-REICH: Couple of follow-up questions.

23 JUDGE NASTOFF: Sure.

24 REDIRECT EXAMINATION

25 BY MS. COOK-REICH:

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1 Q. Before you and your wife married, you were married  
2 before; is that correct?

3 A. Yes, I was married for a few years before.

4 Q. And you had children of that prior marriage?

5 A. I had two children.

6 Q. And you supported them with your income?

7 A. Yes, I did.

8 Q. And before you and Alluster were married, did she  
9 live in what was called the Barricks?

10 A. No. Before we married, it wasn't the Barricks, it  
11 was in the housing units in Hamilton, Ohio. Right there on  
12 Front Street.

10:14AM

13 Q. And I must have written it down wrong. What year  
14 did you and Alluster get married?

15 A. 1962.

16 MS. COOK-REICH: Thank you.

17 JUDGE NASTOFF: Any further cross?

18 MR. EICHEL: No, Your Honor.

19 JUDGE NASTOFF: And again, this witness may be  
20 permanently released?

10:14AM

21 MS. COOK-REICH: Yes, Your Honor.

22 JUDGE NASTOFF: All right. Sir, your testimony is  
23 complete. You are released from any subpoenas and you  
24 are free to go about your business. Thank you.

25 THE WITNESS: Thank you very much, Judges.

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1 MS. COOK-REICH: I next call Alluster Tipton.

2 ALLUSTER TIPTON

3 having been first duly sworn, was examined and testified under  
4 oath as follows:

5 JUDGE NASTOFF: Ma'am, if you would do your best  
6 to try to keep your voice up.

7 THE WITNESS: I will try, okay.

8 DIRECT EXAMINATION

9 BY MS. COOK-REICH:

10 Q. Can you state your name for the record, please?

10:16AM

11 A. Alluster Tipton.

12 Q. Alluster?

13 A. Alluster Tipton.

14 Q. Alluster, where do you live?

15 A. [REDACTED] Forest Park, Ohio.

16 Q. And who do you live there with?

17 A. My husband and daughter.

18 Q. Okay. And your daughter is Carol?

19 A. My daughter is Carol.

20 Q. And your husband is Charles?

10:17AM

21 A. Yes.

22 Q. And do you know the gentleman seated over here to  
23 the right in the tan shirt?

24 A. Yes, I do.

25 Q. And who is that?

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1 A. That is my son. Von.

2 Q. And you call him by Von?

3 A. I usually call him Red.

4 Q. Okay. Allister, how many children have you had?

5 A. Ten.

6 Q. Ten children. Okay. And can you tell me in order  
7 of children?

8 A. Well --

9 Q. I know it is not a test, but --

10 A. Well, let's see. There is Elliot, Von, Carol, I  
11 might not get them in order here. Elliot, Von, Carol,  
12 Charles, Victor, Joanne, Lavonne, had one that passed that was  
13 Gregory. Did I get them all?

10:17AM

14 Q. You missed Michael and Carlos?

15 A. Pardon.

16 Q. Michael and Carlos?

17 A. Oh, Michael and Carlos.

18 Q. Gregory, do you remember between which children he  
19 was born?

20 A. Pardon?

10:18AM

21 Q. Gregory, your child that died, do you recall --

22 A. That is the one that died, yes.

23 Q. Do you recall which children he was born between?

24 A. Greg was born in '56, I think it was, he was three  
25 months old when he passed.

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1 Q. So he was after Joanne?

2 A. No, before Joanne.

3 Q. It was before Joanne? Okay. Elliot and Von are  
4 your two first children; is that correct?

5 A. Yes.

6 Q. And they were born a year apart?

7 A. Yes.

8 Q. And then there is another year between Von and his  
9 sister Carol?

10 A. Yeah, Elliot was born in '45.

10:19AM

11 Q. And what year was Von born?

12 A. Von was born in '46 and Carol was born in '47.

13 Q. And what year was Charles born?

14 A. Charles was born in '49 I think it was.

15 Q. And Victor has already testified he said he was  
16 born in '50; is that right?

17 A. Was that Victor? I think he was born in, oh,  
18 yeah, '50.

19 Q. And Joanne was born in what year?

20 A. Joanne was born in, let's see she is 51. She is  
21 50, so let's see. 50 from -- I am sorry, right now I can't --

10:19AM

22 Q. '59, does that sound right, if she is 50 this  
23 year?

24 A. '59, she must have been born about -- I don't  
25 know.

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1 Q. Okay. well, I will stop testing you on your kids.

2 A. I know her birthday is [REDACTED].

3 Q. I will ask you about your upbringing.

4 A. All right.

5 Q. How many siblings do you have yourself?

6 A. How many siblings do I have?

7 Q. Yes.

8 A. I am an only child.

9 Q. Okay.

10 A. I had a half-brother, I mean, but my mother, I am  
11 only one through her.

10:20AM

12 Q. Okay. Allister, you testified in Von's previous  
13 1984 mitigation trial; is that correct?

14 A. Yes.

15 Q. You came, well, not to this courtroom, but to the  
16 old courthouse and testified; is that correct?

17 A. Yes.

18 Q. Do you have some health problems?

19 A. Do I have health problems? Yes, I do.

20 Q. What are they?

10:20AM

21 A. Bronchitis, emphysema.

22 Q. You were first married to Nick Davis; is that  
23 correct?

24 A. Yeah.

25 Q. And do you remember what year you married him?

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1 A. '45.

2 Q. Okay. And how old were you when you got married  
3 to Nick?

4 A. Eighteen.

5 Q. And were you pregnant at the time when you and  
6 Nick married?

7 A. Yes.

8 Q. Okay. You were pregnant with Elliot?

9 A. With Elliot.

10 Q. How long were you married to Nick Davis?

10:21AM

11 A. Oh, on average about a little over nine years.

12 Q. Okay. During that nine year marriage, was Nick  
13 present in the household the whole time?

14 A. No.

15 Q. Okay. How would you describe when Nick was there  
16 or when Nick wasn't there?

17 A. How would I describe? I'm sorry, I have a hearing  
18 problem.

19 Q. We forgot that one, I'll try to speak up. Could  
20 you give me an indication of how often Nick was in the  
21 household?

10:21AM

22 A. Well, when we first got married Nick was in the  
23 service when we first got married, then after he got out and  
24 got a job, he was in and out, really.

25 Q. He would come live with the family?

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1           A.    He would come in and he would go out. For the  
2 first six months it was okay, I guess, and then after that he  
3 got a job and, you know, he was in and out.

4           Q.    Okay. Two of your children who have the Davis  
5 name, don't have Nick as their father, is that correct,  
6 biologically?

7           A.    Yes.

8           Q.    And they have two different fathers; is that  
9 correct?

10          A.    Yes.

10:22AM

11          Q.    Would that be indicative of Nick being in and out  
12 of the household, in and out of your family's life?

13          A.    Yes.

14          Q.    If Nick wasn't there to support the family,  
15 financially or emotionally, who provided you the emotional or  
16 financial support during those nine years that you were  
17 married?

18          A.    When Nick wasn't there? My mother and my family.

19          Q.    Your family?

20          A.    Yes.

10:23AM

21          Q.    Would it be fair to say that you and your kids  
22 stayed with your family a lot?

23          A.    Yes, we did.

24          Q.    Okay. And what are their names, your family?

25          A.    My family, I stayed with my mother.

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1 Q. Okay. And your great aunt?

2 A. Pardon?

3 Q. And your aunt?

4 A. Yes, my mother and my aunt.

5 Q. Okay. And very early on you stayed with your  
6 grandmother, your mom and your aunt; is that correct?

7 A. Yes, early, yeah, early.

8 Q. Okay. Do you recall how old Von was when you and  
9 Charles Tipton got married?

10 A. When Charles and I got married? We got married --  
11 I think he was a teenager.

10:23AM

12 Q. Okay. Would you say that while living with your  
13 mother and aunt, they helped raise the children in the  
14 household?

15 A. Yes.

16 Q. Okay. It was kind of like a family effort?

17 A. Yes.

18 Q. Okay. Von has been in prison a significant amount  
19 of his life; is that correct?

20 A. Yes.

10:24AM

21 Q. Okay. While he has been in prison, have you had  
22 contact with him?

23 A. Yes.

24 Q. While he has been in prison on death row for the  
25 last 25 years have you had contact with him?

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1 A. Yes, through letters, yes.

2 Q. Have you visited with him?

3 A. No, I haven't been able to visit.

4 Q. Is your health and the distance a difficulty for  
5 you?

6 A. Yeah, my health has been bad.

7 Q. You are aware that these three Judges are going to  
8 decide whether to impose the death sentence?

9 A. Yes.

10 Q. You are aware that they have another option to  
11 impose a life sentence?

10:24AM

12 A. Yes.

13 Q. Are you asking the Court, these three Judges to  
14 impose a death sentence or a life sentence on your son?

15 A. Pardon?

16 Q. Are you asking these three judges to impose a  
17 death sentence on your son or a life sentence?

18 A. Not to death, for sure.

19 Q. If Von was given a life sentence, do you feel he  
20 could still play a part in your life?

10:25AM

21 A. What?

22 Q. If Von is given a life sentence, do you believe  
23 your son could still play a part in your live, even from  
24 prison?

25 A. Yes. Yes.

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1 Q. Can you tell me how your son is meaningful to you?

2 A. Von?

3 Q. Uh-huh.

4 A. I keep in touch with Von as long as I can through  
5 letters, telephone calls if possible, but I wouldn't be able  
6 to visit. He will always be a part of my life.

7 Q. You have had contact with Fran Welland; is that  
8 correct? Fran?

9 A. Yes.

10 Q. Fran has visited with you?

10:26AM

11 A. Pardon?

12 Q. Fran has visited with you?

13 A. Yes, she has.

14 Q. And your family and the rest of your family?

15 A. Yes.

16 MS. COOK-REICH: If I may have just a second,  
17 Judge.

18 Q. (BY MS. COOK-REICH) Did you know Nick Davis to  
19 drink, to be a drinker?

20 A. Pardon?

10:27AM

21 Q. Nick Davis?

22 A. Nick Davis?

23 Q. Uh-huh, do you recall him to be a drinker?

24 A. Yes.

25 Q. Was that part of a problem in your marriage?

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1 A. Yes.

2 Q. And the family life?

3 A. Yes, it was.

4 MS. COOK-REICH: If I could have one second,  
5 Judge. Alluster, that is all of the questions I have  
6 for you, one of these gentlemen might have a question.  
7 Thank you very much.

8 JUDGE NASTOFF: Cross-examination.

9 MR. EICHEL: May it please the Court, we have no  
10 questions of this lady.

10:28AM

11 JUDGE NASTOFF: All right. Ma'am, your testimony  
12 is complete, so they will go ahead and escort you out  
13 at this time.

14 THE WITNESS: Thank you.

15 MS. COOK-REICH: The defense would call Carol  
16 Smith, Your Honor.

17 CAROL SMITH  
18 having been first duly sworn, was examined and testified under  
19 oath as follows:

20 DIRECT EXAMINATION

10:28AM

21 BY MS. COOK-REICH:

22 Q. Can you state your name for the record, please?

23 A. Carol Smith.

24 Q. Carol, where do you live?

25 A. [REDACTED] Forest Park, Ohio.

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1 Q. You live with your mother and stepfather?

2 A. Yes.

3 Q. Do you know the man seated over here to the right  
4 in the tan shirt?

5 A. Yes.

6 Q. Who is that?

7 A. My brother, Von Davis.

8 Q. Carol, there has been some testimony that you are  
9 the third of ten total children born to Alluster; is that  
10 correct?

10:29AM

11 A. Yes.

12 Q. And you, Elliot and Von are a year apart?

13 A. Yes.

14 Q. Okay. So that makes him just a year older than  
15 you are?

16 A. Yes.

17 Q. And you are the -- apparently the second -- I'm  
18 sorry, you are first daughter born?

19 A. First oldest daughter, yeah.

20 Q. Who is your father?

10:30AM

21 A. Nicholas Davis, deceased.

22 Q. Deceased. Do you consider him to be a father?

23 A. No. Charles Tipton is my father.

24 Q. Was Nick Davis around while you were growing up?

25 A. No.

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1 Q. Okay. Do you have any memories of him while you  
2 were younger?

3 A. Vague. Seeing him, I guess, I can remember seeing  
4 him maybe twice as a very young child.

5 Q. And do you recall how old you were when Charles,  
6 your father, and Alluster, your mother, married?

7 A. I was about ten.

8 Q. Do you recall your biological father being in and  
9 out of the house at all or do you just have vague  
10 recollections of him?

10:31AM

11 A. In and out of the house, no.

12 Q. Which one of those two words do you agree with?

13 A. Out of the house.

14 Q. Out of the house. Prior to your mother marrying  
15 Charles, do you recall where you lived?

16 A. On [REDACTED] Hamilton.

17 Q. Do you remember who you lived there with?

18 A. There was a large family, my grandmother, my great  
19 aunt, my great uncle, my great uncle's wife, my brothers.

20 Q. Okay. Did your mother work?

10:31AM

21 A. Yes.

22 Q. Okay. Did your grandmother work?

23 A. Yes.

24 Q. Did your great aunt work?

25 A. Yes, everybody in the household worked.

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1 Q. Okay. Could you tell us which one of those three  
2 females was the head of the household?

3 A. There was no single head of household. Every  
4 grown up in that family was a parent and told us exactly what  
5 to do and they all raised us as equals.

6 Q. Are you employed, Carol?

7 A. Yes.

8 Q. Where at?

9 A. I work for Interim Home Healthcare.

10 Q. And how far did you go in school?

10:32AM

11 A. I graduated from high school, I took some side  
12 courses just for what, better improvement. Like, I took a  
13 partial -- I took a real estate course, I took nursing  
14 courses. I have taken a few other courses just to be taking  
15 them.

16 Q. Okay. Of the Davis children, you were the first  
17 to graduate from high school; is that correct?

18 A. Yes.

19 Q. Von did not graduate from high school?

20 A. No.

10:33AM

21 Q. Elliot did not graduate from high school?

22 A. No.

23 Q. Elliot still lives in town?

24 A. Yes.

25 Q. He is ill currently?

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1 A. Yes.

2 Q. Where did you go to high school at?

3 A. Garfield.

4 Q. Do you know where your brothers Elliot and Von  
5 went to?

6 A. Garfield.

7 Q. You have two children yourself?

8 A. Yes.

9 Q. And their names?

10 A. Duane Davis and Loray Thompson.

10:33AM

11 Q. And Loray Thompson, has actually been charged,  
12 convicted of an aggravated murder; is that correct?

13 A. True.

14 Q. And he, in fact, faced the death penalty at one  
15 time; is that correct?

16 A. I don't remember nothing about a death penalty.

17 Q. Did he have a capital case where he had two  
18 attorneys?

19 A. Yes.

20 Q. Do you recall that case?

10:33AM

21 A. Yes.

22 Q. You didn't testify at his mitigation trial?

23 A. No, I did not.

24 Q. Are there any special or significant memories you  
25 have of your brother, Von, that you remember from growing up

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1 together?

2 A. Childhood memories that I don't think kids will  
3 have nowadays, but we was -- we all got along great. We  
4 played a lot of childhood games. I was the Tom boy because  
5 all of the elder brothers and all of the other boys in the  
6 neighborhood, I was the Tom boy. We played sports together  
7 baseball, basketball, football, we played tag, hide and go  
8 seek, all of the childhood games that kids don't know anything  
9 about now. We built our own go carts and skate mobiles and  
10 you name it, we did it. I went night crawler hunting with my  
11 brother to go get the worms for my father and my brother and  
12 them to go fishing all of the time.

10:34AM

13 we played at the community center because kids  
14 actually could go there and enjoy themselves and it was just  
15 fun growing up, then.

16 Q. Victor has already testified this morning and I  
17 want to see if you agree with the statement he made. He said  
18 that he was the favorite of the family, would that be an  
19 accurate?

20 A. The favorite? What you do mean by favorite?

10:35AM

21 Q. Your grandmother's favorite?

22 A. My grandmother's favorite, yes. You have to  
23 understand why. We picked on Victor. So somebody had to  
24 protect him.

25 Q. Is your brother Von important to you even if he is

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1 serving a life sentence?

2 A. Yes. Very much so.

3 Q. He has been on death row 25 years. How have you  
4 kept in touch with him?

5 A. Through letters and phone calls.

6 Q. Okay. You know that these three Judges are going  
7 to decide whether to impose the death sentence?

8 A. Yes.

9 Q. You are aware that they have a life sentence  
10 option, two life sentence options?

10:36AM

11 A. Yes.

12 Q. Which of those two choices, life or death, are you  
13 asking these Judges to impose?

14 A. A life. Life. Life.

15 Q. Do you think that even while in prison forever,  
16 for the rest of his life, you could still have a relationship  
17 with your brother Von?

18 A. Yes.

19 Q. You would still write to him?

20 A. Yes.

10:36AM

21 Q. You still call and talk?

22 A. Yes.

23 Q. Okay. You have a big family?

24 A. Yes.

25 Q. You come from siblings of ten?

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1 A. Yes.

2 Q. Are you close with Von's daughter Sherry?

3 A. Yes.

4 Q. Have had family gatherings?

5 A. Yes.

6 Q. Von has not been able to be there?

7 A. True, yes.

8 Q. Fran Welland has attended a family gathering?

9 A. Yes.

10 Q. Do you ever receive any mail from Von with  
11 trinkets?

10:37AM

12 A. Yes. He is good for sending articles and trinkets  
13 to pass around to everybody.

14 Q. Are you aware where Sherry Davis works?

15 A. Yes.

16 Q. Where does she work?

17 A. Hamilton -- Butler County Sheriff's Department.

18 Q. What do you want these three Judges to know about  
19 your brother Von that might encourage them to give a sentence  
20 of life, one of the life sentences versus death?

10:37AM

21 A. Even though things have gone the way that they  
22 have, you still have a good person deep inside. And I know it  
23 is hard on everybody, the Butlers and my family, and I don't  
24 see where it will serve any purpose with a death sentence.  
25 It's, some people say it is closure, but it is not closure.

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1 Then you running out to the cemetery looking at a stone and  
2 crying over it. And I know it is not going to help my mother  
3 and my father to know that he is locked up for life, but it is  
4 a life, and I would rather see him -- I don't know how he  
5 feels about it, but I would rather see him or know that he is  
6 still living out his life the best he can behind those bars.  
7 And I just hope that the Butlers can understand that we are  
8 suffering, right along with them. And -- I'm sorry. But it  
9 is a life. And I know he has taken them, but the part that he  
10 does that is good right now, I would like to see it continued.  
11 And I know that he's going to deal with whatever the decision  
12 is, and I know we all have to, I just hope that it is the  
13 right decision.

10:39AM

14 Q. Thank you. One of the gentlemen might have a  
15 question for you.

16 MR. EICHEL: Your Honor, no questions.

17 JUDGE NASTOFF: Ma'am, your testimony is complete  
18 you can take a few of those with you if you need to but  
19 your testimony is complete and you go about your  
20 business.

10:39AM

21 THE WITNESS: Thank you.

22 JUDGE NASTOFF: Can we have one moment?

23 MS. COOK-REICH: Yes, we need check to see if  
24 there is another witness.

25 (Judges confer off the record.)

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1 JUDGE NASTOFF: When Mr. Porter returns I want to  
2 put something on the record. The record will reflect  
3 that both Mr. Davis' attorneys are present as well as  
4 he is, and representatives from the State are present.  
5 During the testimony of the last witness, Carol Smith,  
6 she indicated that she was the mother of Loray Thompson  
7 and I just felt that it is necessary to disclose on the  
8 record that I was a member of the prosecution team  
9 against Loray Thompson, in fact, I argued to the jury  
10 that he should receive the death sentence. It was not  
11 imposed, he received one of the life sentences in that  
12 case. I can tell you that it has no impact on the way  
13 that I would weigh her testimony, but again, in the  
14 interest of full disclosure I do feel that I should  
15 make that known to everyone. I had no knowledge I  
16 mean, Smith, Thompson, Davis there was no notice to me  
17 that that would come up at all. But I did want to  
18 indicate that for the record, and if either side has  
19 any questions for me, about that issue feel free to ask  
20 those. Is there anything from the State?

10:41AM

10:42AM

21 MR. EICHEL: Your Honor, please, it slipped my  
22 mind that you were on that prosecution team, so I was  
23 going to object to relevancy, but then I thought I  
24 chose not to, matter of strategy.

25 JUDGE NASTOFF: Go ahead.

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1 MR. PORTER: In interest of full candor, we were  
2 aware that Your Honor, that you were involved in the  
3 prosecution, and we made a decision long ago not to  
4 challenge you on that.

5 JUDGE NASTOFF: All right. Okay. Well, I just  
6 again, in the interest of wanting everything out there,  
7 I thought that I should state that. Are you prepared  
8 to proceed then with your next witness?

9 MR. PORTER: We are, Your Honor. Cynthia Mausser.

10 MR. OSTER: Your Honor, before the witness comes  
11 in, I would object to this witness being called.

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12 JUDGE NASTOFF: Okay. All right. Well, why don't  
13 we go ahead and be heard on that matter first.

14 MR. OSTER: Your Honor, Ms. Mausser is the chair  
15 of the Adult Parole Authority.

16 JUDGE NASTOFF: Yeah, in fact, I should also  
17 mention I guess, since we are doing all of this, that I  
18 serve on the Ohio Criminal Sentencing Commission,  
19 Cynthia Mausser, if she is not a member, she certainly  
20 is present at a large number of those meetings, I know  
21 her, but only professionally through those meetings.  
22 Other than contact in those meeting, the only other  
23 contact I had is that she had invited me at one point  
24 to attend a parole hearing to observe. Of course my  
25 schedule, her schedule never allowed that to take place

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1 at least as of yet, but I do want to indicate that I do  
2 -- I am familiar with Ms. Mausser as well, but again, I  
3 only know her professionally and I can judge her  
4 credibility the same as any other witness but if she  
5 were to testify.

6 MR. OSTER: Your Honor, a couple of reasons, first  
7 1992 case of *State v. Mills*, M-I-L-L-S, 62 Ohio State  
8 3rd 357, I believe the pinpoint cite would be 374, in  
9 discussing whether or not a trial Judge erred in  
10 failing to instruct in the possibility of parole, the 10:44AM  
11 Court stated that release on parole other than  
12 specified after a minimum of 20 or 30 years and a life  
13 sentence does not relate to the specified statutory  
14 factors and is a nebulous area which the trial court  
15 may legitimately avoid. Further, we would state and I  
16 would proffer to this Court, I have spoken to Ms.  
17 Mausser, Ms. Mausser is a member of a board, one  
18 person, statutorily that board has to have between  
19 seven to twelve people on that board. Ms. Mausser  
20 herself could not testify and has told me that she 10:45AM  
21 would not be in a position to be able to testify  
22 whether or not she would vote for parole or not vote  
23 for parole, it would be improper for her to say that  
24 she could not say what a majority of the board would do  
25 as they are not here. None of the board members, even

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1 if all seven or twelve were present would be able to  
2 say how they would vote because this case is not in  
3 front of them. It has not been presented to them. The  
4 entire thing would be speculation in which they could  
5 not be able to adequately express an opinion. It would  
6 be similar, I think the case of *State v. Jenkins*, the  
7 1984 case where they first tried testimony of social  
8 scientists and statistics, possibilities, that was an  
9 Ohio Supreme Court case for the record, 15 Ohio State  
10 3rd, 164, it failed to show a number of things as to  
11 deterrents and murder.

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12 There has been cases that have talked about how  
13 much something costs and that is not relevant to the  
14 specifics of this individual and his factors. And it  
15 cannot be forgotten that that is what the Court is here  
16 to weigh, is the specifics to this individual. Ms.  
17 Mausser, as the head of this board cannot discuss what  
18 the board would do on a case that is not before her.  
19 Going outside the touch of Ohio, I know the Supreme  
20 Court of Missouri has looked at this issue in the case  
21 of W-I-L-C-H-E-R, *wilcher vs. State*, 1997, 697, SO.2D  
22 1087, and they found that because parole is not  
23 automatic, that no person has a right to it, allowing  
24 argument or testimony regarding a possibility of the  
25 defendant some day being paroled is in effect inviting

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1 the jury, in this case the three-judge panel, to  
2 speculate how ten years in the future the parole board  
3 may exercise its legislatively granted discretionary  
4 authority. This would introduce into the sentencing  
5 proceedings an arbitrary fact, while obviously not the  
6 Court, the State of Ohio court, the wording, the  
7 reasoning, falls perfectly in line with Ohio statutes  
8 and is something that Ms. Mausser simply cannot do.  
9 Ms. Mausser could not promise you that she would be on  
10 the parole board when Mr. Davis' case is heard if it  
11 ever is heard.

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12 And so, Your Honor, because it is not A, relevant  
13 because it is not specific to this defendant, it would  
14 be entire speculation because she is only a member of  
15 one of seven to twelve persons on a board that does not  
16 even have this case in front of it. She cannot promise  
17 us that she would be on the board at the time it came  
18 in front of it, and she could not give an opinion as to  
19 how she, herself, would even vote. This is entirely  
20 irrelevant and speculative and should not be in front  
21 of this three-judge panel for this matter.

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22 JUDGE NASTOFF: Thank you, Mr. Oster. Mr. Porter,  
23 Ms. Cook-Reich, do you wish to respond?

24 MR. PORTER: I do, Your Honor. I first direct  
25 Court to *State vs. Bradley*, 42 Ohio State 3rd, 136.

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1 Pinpoint cite 149. The Court held, quoting now from  
2 the Court, the Ohio Supreme Court, similar  
3 consideration should be given under RC 2929.04(D)(7) to  
4 the probability that appellate will never be released  
5 from prison, if sentenced to life in prison, the weight  
6 of this consideration is minimal substantially however  
7 by the fact that appellate was in the penal institution  
8 when the attack occurred. Obviously, the second  
9 sentence doesn't apply. The first sentence does apply.  
10 Going ahead and looking at the case of *State vs.*  
11 *Campbell*, C-A-M-P-B-E-L-L, 90 Ohio State 3rd, 320  
12 pinpoint cite on this would be 327, quote, and this is  
13 in parens, although the state contends that this is not  
14 a mitigating factor at all, with respect to whether he  
15 will ever be released, we have -- and we have  
16 recognized that consideration shall be given under  
17 2929.04(D)(7) to the probability that appellate will  
18 never be released from prison if sentenced to a life in  
19 prison.

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20 There is a unique situation in this case. And I  
21 know, Judge Nastoff, we have been before you for two  
22 years and every time we said there is a unique  
23 situation in this case. We could have probably pulled  
24 (inaudible), there is in this case a very, with respect  
25 to this issue, a very unique thing, because Von is

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1 going to be parole eligible in six years, so normally  
2 if this Court was deciding on a -- to impose thirty to  
3 life or death, the Court would actually be looking at  
4 him having to serve thirty years. It becomes a much  
5 different equation in this case because he is parole  
6 eligible in six years and I think that issue has to be  
7 addressed.

8 We have, and again with all due respect to the  
9 prosecutor, we will be in a position of surprise and  
10 affirmative damage if she testifies as the prosecution  
11 is suggesting because we, in fact, interviewed her four  
12 months ago and Ms. Cook will testify, if necessary,  
13 that that is not what we were told.

10:50AM

14 JUDGE NASTOFF: All right. One thing that I will  
15 indicate before we go forward and I think probably what  
16 would be -- what I would recommend is that we take a  
17 brief break, it's probably a good time to take a brief  
18 break anyway, provide us with copies of Mills,  
19 Campbell, Bradley for us to review. But what I am  
20 going to indicate is the materials that are put out by  
21 the Ohio Judicial College on capital cases, it's  
22 something that I have used as a resource in preparing  
23 for the capital cases that have been before this Court.  
24 On the outline they list mitigating factors and it's  
25 under 7, any other factor that is relevant to the issue

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1 of whether the offender should be sentenced to death,  
2 subsection P, probability if not released from prison,  
3 and the citation is to the Campbell case. I can  
4 indicate that this Court relied on Campbell in citing  
5 that as a mitigating factor in the Geldridge case and I  
6 think that was included in the sentencing opinion of  
7 the Court that that was one of the factors.

8 I can't remember as I sit here now how much weight  
9 was given to it, but it was a factor that existed and  
10 was considered by the panel in that case. But, in all  
11 fairness, I think that I -- that was a case of life  
12 without parole. This is not, so I would be willing to  
13 read those cases before we rule and I think that -- I  
14 don't think that either of you are familiar with  
15 Bradley, Campbell or Mills off the top of your heads,  
16 are you?

17 JUDGE SPAETH: Sure.

18 JUDGE NASTOFF: Are you?

19 JUDGE SPAETH: Absolutely.

20 JUDGE NASTOFF: So any objection to my proposal  
21 that we take a brief break?

22 JUDGE PATER: Let me ask a follow-up question or  
23 two before we do that. The response given by defense  
24 counsel to what was raised by the State's counsel, I  
25 think to not address the primary objection, and the

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1 primary objection seemed to be that we are looking at  
2 speculation here. I don't know that the State was  
3 unaware of the case law that Judge Nastoff cited here  
4 and was cited by defense counsel in the Campbell case,  
5 that the likelihood of there not being parole is a  
6 mitigating factor. That is the case law. We are all  
7 bound by that, I believe.

8 But the fundamental question here seems to me is,  
9 how can that, if there is such evidence as there is  
10 likelihood that there will not be parole, how can such  
11 evidence be introduced? And what was alleged by the  
12 state's attorney here by the prosecutor, is that you  
13 have a seven to twelve member board; that the board, in  
14 fact, is the entity that would make any such decision;  
15 that that decision would have to be made and by  
16 concession of defense counsel, could only be made at  
17 some point at least six years from now; that at that  
18 time, there is no assurance whatsoever that Ms. Mausser  
19 would be on the board. There is no knowledge  
20 whatsoever of who else would be on the board. There is  
21 no way to determine how those seven to twelve members  
22 would vote. Therefore, anything that Ms. Mausser would  
23 say, would have to be speculation. That is the thrust  
24 of the State's position it seems to me. And I don't  
25 think defense has addressed that at all.

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1 MR. PORTER: Certainly her past experience is  
2 relevant experience, she can speak to that.

3 JUDGE PATER: Can you proffer? Are you willing to  
4 proffer at this point -- are you saying that Ms.  
5 Mausser has experience? Is she going to get on the  
6 stand and say, you know, in my experience we have had  
7 ten cases where a person has been convicted of a first  
8 murder, he was convicted of a second murder, he was  
9 eligible for parole after 30 years, 25 years, 20 years,  
10 and in all of those cases, the parole -- the request  
11 for parole was rejected, is that the kind of specific  
12 testimony that we are going to hear or are we just  
13 going to hear I think? What can you proffer?

10:55AM

14 MR. PORTER: It is my belief based upon our  
15 conversation with her through three or four months ago,  
16 is that she will say based upon similar factors, that  
17 she has seen in other cases, she would not anticipate  
18 that he would ever be paroled.

19 JUDGE NASTOFF: All right. I think we know what  
20 we are dealing with.

10:55AM

21 MR. OSTER: If I may, the only thing I would say  
22 is looking at Bradley and Campbell, they talk about  
23 consideration being given. Your Honor, citing the  
24 Geldridge case, talked about consideration, we are  
25 talking about testimony. Testimony still has to meet

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1 Rules of Evidence. You can give consideration in  
2 closing argument when they argue that parole is, as  
3 they have been stating an option. You can give a  
4 consideration as a catch all based upon that, but the  
5 Rules of Evidence and testimony can't just be  
6 eviscerated because there is a quote, unquote, unique  
7 situation. Statutes, Rules of Evidence, still must be  
8 followed whether a situation is as ordinary and as  
9 plain as day or as unique as there can be. There still  
10 are guidelines that we must follow even in the most  
11 unique of situations.

10:56AM

12 MR. PORTER: If I can respond twofold to that,  
13 first is, as the Court well knows, the Court is not  
14 locked into the Rules of Evidence in a mitigation  
15 capital hearing, and secondly, what I think I hear the  
16 prosecutor arguing is, yeah, you can consider this as a  
17 mitigating factor, they just can't introduce any  
18 evidence on it. I mean, you know, at that point, how  
19 can we get up, how can Von get up and argue something  
20 as a mitigating factor that you have precluded us from  
21 producing testimony? You know, maybe we can do that.  
22 I guess I would, if I was the prosecutor, I would  
23 object. There would be no evidence. And secondly, if  
24 I was a three-judge panel, and I am certainly not  
25 trying to put myself in your position, but would I go,

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1 well, I am not going to give that any weight because  
2 Porter didn't introduced any testimony.

3 JUDGE NASTOFF: All right.

4 JUDGE SPAETH: Can I interject, please? The  
5 defense team is suggesting that the witness is going to  
6 testify as to a probability, that sounds like an  
7 opinion to me. It seems to me that we just simply put  
8 the witness on the stand, allow the witness to be voir  
9 dired before the witness states an opinion, then we  
10 will argue whether or not the witness has the proper  
11 basis under Rule 702 to the extent it is applicable to  
12 this case and that Rule is applicable to this case  
13 whether or not that witness has sufficient background,  
14 knowledge, experience, that she would be in a position  
15 to give this opinion.

10:57AM

16 And instead of speculating as to what the witness'  
17 knowledge, experience, may be of this topic, let's hear  
18 from the witness and allow the State to voir dire and  
19 then we will determine whether or not she is going to  
20 be able to give us an opinion. It sounds like all  
21 three of the Judges, myself included, are in agreement  
22 that this testimony has some relevance and it is proper  
23 in a mitigation hearing, this type of evidence, maybe  
24 not this particular testimony or this particular  
25 witness, but evidence of the probability of release,

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1 and the likelihood of parole is relevant. So that  
2 would be my suggestion for the record as to how we  
3 should proceed at this juncture.

4 JUDGE NASTOFF: All right. With that being said,  
5 why don't we take a brief break. Provide those cases.  
6 We will discuss the matter further and we will come out  
7 and be able to proceed in the appropriate matter.

8 MR. PORTER: I just have a housekeeping matter.

9 JUDGE NASTOFF: Can it wait until we get back?

10 MR. PORTER: It's just a minor -- I am willing to  
11 provide the Court with copies of the cases. I just  
12 have mine highlighted and starred at the relevant  
13 paragraph. I didn't want to be accused of leading the  
14 Court.

10:59AM

15 JUDGE NASTOFF: Well, hopefully you would draw our  
16 attentions to the portions that you thought were  
17 relevant. I don't think that there is anything wrong  
18 with that. All right.

19 (Recess taken at this time.)

20 JUDGE NASTOFF: We're back on record in State of  
21 Ohio vs. Von Clark Davis, CR1983-12-0614. All parties  
22 and counsel present prior to our recess again are  
23 present including all three members of the panel.

11:37AM

24 During the recess, we reviewed the cases that were  
25 cited by counsel. And discussing the issue, the

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1 testimony of Cynthia Mausser at this time, I think it  
2 would be appropriate to proceed in the manner that was  
3 referenced by Judge Spaeth in his comments before we  
4 left the bench. Let's start to hear the testimony, and  
5 if you think that it's appropriate to object at a given  
6 point in time we will address the objection.

7 MR. OSTER: Just so I am clear, Your Honor, this  
8 is actual testimony, it's not proffered as a Dauber. I  
9 just want to make sure I understand how we are  
10 proceeding.

11:38AM

11 JUDGE SPAETH: I didn't hear Dauber or 702 as the  
12 basis of your objection until just a moment ago.

13 MR. OSTER: It wasn't, Your Honor. I believe Your  
14 Honor said 702 when you were referencing your  
15 suggestion as to how to proceed.

16 JUDGE SPAETH: I think the witness can testify,  
17 counsel, to facts as her knowledge, her experience.  
18 None of that is in the form of an opinion. If at some  
19 point in time the defense wishes to qualify her as an  
20 expert, have her state an expert opinion, then to the  
21 extent that Rule 702 applies in a capital sentencing  
22 proceeding such as this, the Court will take a look at  
23 her background, knowledge, information, the factors set  
24 forth in Rule 702 and opinions similar to Dauber under  
25 Ohio law, and make a determination as to whether or not

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1       that opinion will or will not be admitted.

2               I would suggest that if prior to her stating an  
3       opinion if the State team wishes to voir dire the  
4       witness as to her knowledge, experience, background and  
5       basis to form such an opinion that the State be  
6       permitted to do so. But in the meantime, the witness  
7       can testify as any other witness to information that  
8       she has firsthand knowledge of that is not otherwise  
9       objectionable under the Rules of Evidence.

10              MR. OSTER: I apologize, I must have been  
11       inarticulate in my question. I was just asking whether  
12       it was actually going to be direct testimony or  
13       proffered because I was not sure what we were  
14       discussing. I am clear on what we are doing now.

11:40AM

15              JUDGE SPAETH: I think it is direct testimony. I  
16       wasn't -- probably wasn't very clear in my response.

17              MR. OSTER: Thank you, Your Honor.

18              JUDGE NASTOFF: I would concur.

19              JUDGE PATER: I concur as well.

20              JUDGE NASTOFF: All right. Call the witness.

11:40AM

21                              CYNTHIA MAUSSER

22       having been first duly sworn, was examined and testified under  
23       oath as follows:

24

25                              DIRECT EXAMINATION

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1 BY MR. PORTER:

2 Q. Can you state your name for the record, please?

3 A. Cynthia Mausser.

4 Q. Could you spell your last name for Jill, the court  
5 reporter?

6 A. M-A-U-S-S-E-R.

7 Q. And your work address?

8 A. 770 West Broad Street in Columbus.

9 Q. Are you currently employed, Ms. Mausser?

10 A. Yes.

11:41AM

11 Q. And for whom are you employed?

12 A. I am employed with the Department of  
13 Rehabilitations and Correction.

14 Q. And your current title in that position?

15 A. I am the parole board chair.

16 Q. What does that entitle?

17 A. The chair, well, I am a member of the board and  
18 then the chair is responsible for the overall management of  
19 the duties of the board members, hearing officers, and other  
20 staff, administrative staff that work for the board.

11:41AM

21 Q. Do you also sit on the parole board itself in  
22 that -- in your duties as head of the parole board?

23 A. Yes, I do.

24 Q. How long have you held that job?

25 A. As chair since October, 2005.

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1 Q. Prior to that, did you work for the same employer?

2 A. Yes.

3 Q. And your role then was?

4 A. I was a board member since 2001.

5 Q. How does one become a member of the parole board?

6 A. You are appointed by the director of the  
7 department.

8 Q. How does one become head of the parole board?

9 A. It's the same appointment. It's appointed by the  
10 director.

11:42AM

11 Q. It's my understanding that you are also a licensed  
12 attorney?

13 A. Yes.

14 Q. And what year were you licensed?

15 A. 1991.

16 Q. And we have spoken once previously regarding your  
17 testimony?

18 A. Yes.

19 Q. And several times about serving the subpoena; is  
20 that correct?

11:43AM

21 A. Yes.

22 Q. And I did not know when I spoke to you, but is it  
23 my understanding you used to work for the office of the Ohio  
24 Public Defender?

25 A. I did.

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1 Q. And in what capacity?

2 A. I was assistant public defender. I worked at  
3 prison legal services at Lorraine Correctional representing  
4 technical parole violators in front of the parole board. I  
5 was an assistant state public defender and I worked at  
6 Lorraine Correctional Institution in prison legal services.  
7 Essentially representing parole violators in front of the  
8 parole board.

9 Q. I am going to ask you just some general questions  
10 first on how the parole board operates.

11:43AM

11 A. Okay.

12 Q. And then focus your attention. How does a case  
13 come before the parole board?

14 A. Are you talking about a case for release onto  
15 parole?

16 Q. Yes.

17 A. That type of case? When an offender serves their  
18 minimum sentence, that month that they are eligible for parole  
19 consideration is calculated by the Bureau of Sentence  
20 Computations. And they are put on what we call a call sheet  
21 or it is a list of that month's hearings through the various  
22 institutions in the department. And then once an offender is  
23 seen after their statutory first hearing, any subsequent  
24 release consideration hearing is determined by the board at  
25 that first hearing.

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1 Q. Is any sort of investigation conducted with  
2 respect to a parole hearing?

3 A. We review whether it is either a presentence  
4 investigation that the Court may have ordered, or an offender  
5 background investigation or post-sentence investigation.  
6 Those reports that are prepared by parole officers or  
7 probation officers are reviewed by us. They are our primary  
8 source of information.

9 Q. And I probably didn't articulate my question very  
10 well. If someone is on the list, and I forget your  
11 terminology already, to have a parole board hearing, is there  
12 a separate investigation conducted at that time?

11:45AM

13 A. No.

14 Q. Is there some procedure for soliciting input from  
15 individuals with respect to a parole board hearing?

16 A. We are mandated by statute to send out notice to  
17 the sentencing judge, the county prosecutor, and any victim  
18 that might be registered with the office of victim's services  
19 advising. Right now the requirement is 21 days in advance of  
20 the hearing that this hearing is going to be conducted. And  
21 then any information that we receive based on those notices,  
22 is reviewed as well as a result of Laura's law we have to post  
23 hearing dates on the DRC website. So sometimes we get in just  
24 general comments from the public and that information is  
25 considered as well.

11:45AM

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1           Q.    In a case such as this where there is a presiding  
2 Judge and two other Judges involved, will the parole board  
3 seek input from just a presiding judge or do they seek it from  
4 all three Judges?

5           A.    The statutory requirement is that notice is sent  
6 to the presiding judge and I believe that is still -- there  
7 was a minor change to that statute as a result of House Bill  
8 130, but I don't believe that that particular language was  
9 changed. So it is sent to the presiding judge.

10          Q.    Is there any psychological testing done with  
11 respect to an individual prior to a parole board hearing?

11:46AM

12          A.    If we are considering release of an offender, we  
13 will order what is called a clinical risk assessment. It is  
14 not a full psychological evaluation, but current practice is  
15 for this document to be requested through the mental health  
16 division or department in that particular prison where the  
17 offender is incarcerated, and they will interview the  
18 offender, review file material, and then submit a report to us  
19 assessing 24 established risk factors and whether or not they  
20 are present or not present in this particular individual's  
21 case and they make sort of a general conclusion about the  
22 level of risk.

11:47AM

23          Q.    And you use the term, they conduct, would you tell  
24 the Judges when you use the term they, who we are talking  
25 about?

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1           A. It is somebody in the mental health department in  
2 the institutions, and they are usually, I can't remember the  
3 exact title, I think psychology assistant actually conducts  
4 the interview and then that is signed off on by the  
5 supervising psychologist in the individual prisons. That may  
6 have changed a little bit due to some -- that is generally the  
7 way it is in the institutions, who actually conducts the  
8 interview and then who signs -- a supervisor signs off on the  
9 report.

10           Q. And help me here because I am a little bit  
11 confused. Is that done in all cases that are coming before  
12 the --

13           A. No.

14           Q. -- parole board? What is the criteria for --

15           A. We usually request that when we are somewhat  
16 considering whether release is appropriate -- let me restate  
17 that. We usually order that when we are actually considering  
18 releasing someone. So if someone is coming out for a first  
19 hearing its not an automatic thing that is ordered. It is at  
20 the discretion of the board member, you know. I might be  
21 leaning towards release on this person, so I am going to go  
22 ahead and ask for this report to further aid in that decision  
23 making.

24           Q. And I think, and I am not trying to put words in  
25 your mouth, so please don't take it that way. I thought you

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1 said there were 24 factors to be considered; am I correct  
2 there?

3 A. Correct.

4 Q. And do you have a list or can you tell the Judges  
5 what those factors are?

6 A. I do not have the 24 memorized, but it's prior  
7 criminal history. There is elementary school maladjustment.  
8 I think they review programming. They review prior probation  
9 or parole violations, how much the level of violence or if you  
10 have hurt people previously. And I know they categorize that  
11 as something that I am not stating correctly now, but that is  
12 one of the risk factors. I am trying to think of what some of  
13 the other ones are, but they are based on the history of the  
14 individual. Did I say prison adjustment? I know that is one  
15 of them. If there is a mental health diagnosis -- I'm not  
16 sure how many I just named, but there are 24 that are  
17 established and this is a policy of the mental health section,  
18 those risk factors they utilize based on research and their  
19 policies.

11:49AM

20 Q. Is there a scoring system that you all use with  
21 respect to or a score sheet with respect to individuals that  
22 are appearing before a parole board?

11:50AM

23 A. Yes.

24 Q. And could you explain that to the Judges?

25 A. We use a guideline system to assist us in making

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1 these decisions on who is suitable for release. And part of  
2 the guidelines is a matrix, and it is a chart essentially that  
3 has a score of the offense that they are convicted of rated  
4 from one to 13, one being the least serious and 13 being the  
5 most serious offense, and then their prior history is given  
6 a -- a criminal history risk score which goes from zero to  
7 eight, zero being no prior criminal history, eight being a  
8 significant prior criminal history, and where these two  
9 numbers meet on the grid, gives us a general range of months  
10 where that is sort of a starting point, one of the factors  
11 that we consider where release may be considered appropriate  
12 or that time served is considered about standard or  
13 appropriate for sort of the average heartland case, but that  
14 chart is just one of the factors in the guidelines that we  
15 utilize.

11:51AM

16 Q. Are you able to identify for the Judges today  
17 other factors that are in the guidelines or is that the same  
18 as the 24 you mentioned previously?

19 A. No. We have by administrative rule, there is, I  
20 think there are 17 mandatory considerations, and those are  
21 much of the information I -- I referred to earlier, the PSI or  
22 OVI, whatever, investigation report that we have, any  
23 responses that we have gotten from our statutory notices, the  
24 prisoner's adjustment both in programming and conduct, their  
25 release plan, their support in the community, I know I am

11:52AM

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1 missing a few, but there are certain factors that designated.  
2 Senate Bill 2, parity, and those are things that we have to  
3 consider. And then we have sort of taken some of the  
4 sentencing guidelines from Senate Bill 2 and incorporated that  
5 into our manual as well in terms of aggravating and mitigating  
6 factors that relate to the offense and the offender and we  
7 balance of that out and weigh all that out when we make our  
8 determinations.

9 Q. You say, or you testified, excuse me, that you  
10 rate the seriousness of the offense which they are currently  
11 serving; is that correct?

11:53AM

12 A. Yes.

13 Q. And if you know, a life sentence for an individual  
14 that was convicted of aggravated murder with capital  
15 specifications, where would that fit on the guidelines? There  
16 is a one to 13 rating, I'm sorry.

17 A. Right, somebody who was convicted of capital  
18 specifications I don't know that they would be in front of us,  
19 though. But an aggravated murder who is parole eligible would  
20 be a 13.

11:54AM

21 Q. And you also testified that you would look at a  
22 rate the prior offenses that the individual has committed?

23 A. We have what is called a criminal history risk  
24 score and it goes from zero to eight, and includes factors  
25 about their prior criminal history. That gives them this

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1 score.

2 Q. And if an individual was convicted per the time  
3 that you were practicing law of what was then second degree  
4 murder, are you able to put that where that would fit on a  
5 score of one to eight?

6 A. Well, it is not just convictions though, it is  
7 also -- it is juvenile adjudications, it is commitments into  
8 -- of more than 60 days or commitments into an institution of  
9 more than a year, it is prior and current parole and/or  
10 probation violations, and then those are all the things that  
11 give you points and then you get a point taken away if you  
12 were over 40 when you committed the offense, so it is not just  
13 based on what you were convicted of previously, but as well as  
14 whether or not you were committed to prison, served jail time  
15 of a significant amount and then whether or not you had a  
16 previous history of violating some sort of supervision.

11:55AM

17 Q. And am I correct and I don't want to lead you,  
18 does it detract from your score or increase your score if you  
19 have a prior parole violation?

20 A. It increases your score.

11:56AM

21 Q. If you have served a prior term of incarceration  
22 for approximately ten years, would that increase or decrease  
23 your score?

24 A. That would increase your score.

25 Q. You used the term when we spoke -- and I don't

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1 have the background and the Judges maybe probably are more  
2 familiar than I am of the phrase, full board.

3 A. Okay. Yes, I am familiar with that.

4 Q. Could you explain that for the record?

5 A. It is actually meant two different things at two  
6 different points in -- along the way. Prior to Senate Bill 2  
7 full board meant case consideration by a majority of the board  
8 members. Now, we call that Central Office Board Review. And  
9 certain offenses require a majority of the board members to  
10 say yes to that person in order for them to be released.  
11 Certain other offenses don't. Now -- I'm sorry.

11:57AM

12 Q. Sorry, I cut you off. Please continue, I  
13 apologize for cutting you off.

14 A. In 1996 along with Senate Bill 2 part of the code,  
15 the process was enacted called full board open hearing and  
16 when we propose parole on someone, the office of victim  
17 services at the request of a victim or victim survivor can  
18 request that we hold what is called a full board open hearing  
19 and it is a more open hearing that we conduct at central  
20 office where the victim, prosecutor, sentencing judge, law  
21 enforcement, as well as an inmate representative come in and  
22 present arguments to us for and against release.

11:57AM

23 Q. With respect to an individual that has been  
24 convicted of aggravated murder, would that be an offense that  
25 would have required a full board hearing?

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1           A. It is an offense that would require a majority of  
2 the board members to say yes. To vote for parole.

3           Q. And how many members are there on the parole board  
4 when -- I understand two have recently resigned; is that  
5 correct?

6           A. Retired.

7           Q. Retired, excuse me.

8           A. Yes. We have seven today.

9           Q. When you have a complete complement of board  
10 members, how many are there?

11:58AM

11           A. Statutorily it says up to twelve, but since about  
12 -- since I was appointed in 2001 -- I'm sorry, since about  
13 2002, we have been operating at nine.

14           Q. When you say a full board hearing, are you saying  
15 that actually -- this -- let me back up for minute.

16           A. Okay.

17           Q. Sorry. Does the nine include yourself?

18           A. Yes.

19           Q. When you use the term full board hearing, does  
20 that mean actually that all nine members appear or that it  
21 just -- for the hearing itself or just it takes the vote of  
22 five members whether they are present or not.

11:59AM

23           A. It takes the vote of the majority whether or not  
24 they are all present at the same time, that is not what I mean  
25 by full board. Full board now is the open hearing that takes

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1 place. That is what we now call central office board review.

2 Q. If it is not a full board hearing then I assume it  
3 is less than all -- or less than a majority of all nine; is  
4 that correct?

5 A. If the case doesn't require a majority of the  
6 board member's vote then it can be as few as one person, one  
7 board member, I'm sorry I should say that.

8 Q. Am I gathering from your testimony that if it is a  
9 full board, that there is more opportunity for the various  
10 individuals that have opinions to appear and voice their  
11 opinions?

12:00PM

12 A. When we have those votes, when the majority of the  
13 board members have to vote on the case it is still a closed  
14 proceeding, but it is subsequent generally to the institution  
15 hearing. So there is some lapse in time that if someone  
16 wanted to present additional information or send in additional  
17 information, or contact us with additional information, we  
18 would receive it, but we are also moving towards trying to  
19 conduct the institutional hearings through video conference  
20 with a majority of the board members participating at that  
21 same time.

12:01PM

22 Q. For the individuals that you are required by  
23 statute to seek input, can they -- do they have the option of  
24 actually appearing before the board to present their opinion  
25 or evidence?

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1           A.    Yes.  We have a practice where generally the month  
2 prior to the scheduled hearing date we hold a day of  
3 conferences for victims, and a day of conferences for  
4 offender's supporters and we meet with them to exchange  
5 information.  Oftentimes with the victims, prosecutors or law  
6 enforcement will attend with them.  There have been occasions  
7 where we have held separate conferences, but usually they are  
8 together.

9           Q.    I want to ask you a series of questions with  
10 respect to whether particular facts are positive or negative  
11 or neutral or it depends upon the case with respect to  
12 consideration for parole.

12:02PM

13           A.    Okay.

14           Q.    And I -- if an individual has committed a similar  
15 offense prior to the offense he is going to appear before the  
16 board on, is that a negative, positive or --

17           A.    I would say that tends to be a negative factor.

18           Q.    And that is because?

19           A.    They are repeating criminal behavior.

20           Q.    If the Judge, prosecutor and victim oppose parole,  
21 will that be a negative or positive or neutral factor?

12:03PM

22           A.    That tends to be a negative factor.

23           Q.    If a local, and I am getting away from my question  
24 for a minute, so bear with me.  Is a local law enforcement  
25 agency able to submit information and material to you separate

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1 and apart from the prosecutor?

2 A. Yes.

3 Q. Is the local law enforcement agency one that you  
4 are required to contact or would they have to do that on their  
5 own?

6 A. No, we are not required currently by statute to  
7 contact them.

8 Q. If an individual had previously been of good  
9 behavior, and released, and later committed another offense of  
10 similar offense, and then resumed his or her good behavior  
11 again in the institution, would the fact that once again the  
12 individual has been of good behavior, how would that -- would  
13 that be a neutral, positive or negative factor?

12:04PM

14 A. You are talking about somebody that was released  
15 and recommitted?

16 Q. Recommited, had previously, let me clarify my  
17 question. Had previously been of good behavior, released,  
18 recommitted on a separate offense, resumed good behavior while  
19 in the institution, how would the board view that good  
20 behavior, as neutral, good or bad?

12:05PM

21 A. The current good behavior within our guidelines we  
22 rate both conduct and programming, so it is a factor that is  
23 taken into consideration, but when you are considering  
24 subsequent parole, the fact that they behaved and got out and  
25 recommitted and then behaved again in prison I think would

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1 probably tend to be more of a neutral factor, at least that  
2 combination of facts that they were good then and they are  
3 good now.

4 JUDGE PATER: Before you proceed let me interject  
5 with a question.

6 A. Okay.

7 JUDGE PATER: In the last several questions that  
8 have been asked, the answers generally have been this  
9 factor would tend to be what if. I am confused about  
10 what that means. On some earlier questions we talked  
11 about a scale of one to 13, a scale of one to eight, we  
12 talked about a form that was, I think if I understood  
13 the answers correctly, a form that all of the board  
14 members use, a standard form, but on these questions,  
15 the recent questions the answers have been well this  
16 would tend to be. What does that -- what do those  
17 answers mean? I mean, is there -- with these kinds of  
18 factors that Mr. Porter is asking about, is there a  
19 form that this goes onto? Is there a set numbering  
20 system or is this just an individual subjective  
21 assessment or what?

12:06PM

12:06PM

22 THE WITNESS: In terms of their behavior, is that  
23 what you are --

24 JUDGE PATER: Well, in terms of the last three  
25 questions probably the hypotheticals that have been

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1 presented. In other words, when you are giving your  
2 answer, it would tend to be this or that, what is your  
3 frame of reference is what I am asking.

4 THE WITNESS: My frame of reference is in the  
5 general way that we apply the aggravating and  
6 mitigating factors and all of the factors surrounding  
7 somebody who is incarcerated and who are considering  
8 for release. There are so many individual  
9 considerations and we are given the discretion to weigh  
10 all of those individually that it is hard to say, you  
11 know, absolutely this will happen if this person has  
12 scored here or has committed these kinds of infractions  
13 or has completed this kind of programming, because  
14 there's, you know, you are dealing with people and  
15 there is a lot of individual factors that go into that.  
16 So I think the last question was about behavior or  
17 institutional conduct is how we refer to it and on the  
18 guidelines that we are utilizing currently this third  
19 edition, we rate their institutional conduct as  
20 superior, good, or fair. And we have definitions of  
21 those categories, so if you have never been written up,  
22 and you have never been in the hole, your conduct is  
23 going to be superior. If you have, you know, if you  
24 are currently in segregation appearing in front of the  
25 board, obviously it is going to have -- you are going

12:07PM

12:08PM

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1 to be placed in that rating of probably poor. Fair  
2 might be you have had some tickets but are you starting  
3 to improve, and then good would be, you know, maybe you  
4 had one when you first came in and you have gone  
5 several years without having any placements in  
6 segregation. And the tickets, the behavior that the  
7 board views as the most serious, is generally the  
8 behavior that results in a placement in segregation.  
9 So there is a lot of tickets that we -- that is how  
10 they are referred to, of infractions that are written  
11 up and guys get put, called tickets, they are responded  
12 to in ways other than being placed in segregation. And  
13 that we don't necessarily consider serious or  
14 significant in terms of conduct.

12:09PM

15 JUDGE PATER: You may proceed.

16 MR. PORTER: And I don't know whether it is  
17 appropriate or not, and I certainly do not mean to be  
18 inappropriate, the panel has not asked a lot of  
19 questions and, please, and I know you know your  
20 discretion and I don't mean to step on that, but please  
21 feel free to raise any questions you have. Thank you.

12:09PM

22 JUDGE PATER: Thank you, Mr. Porter.

23 JUDGE NASTOFF: Before you get restarted just an  
24 administrative issue real quick. This is obviously not  
25 intended to affect the length of anything you do. You

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1 can obviously proceed as long as you feel appropriate.  
2 We do have a judge's meeting that was previously  
3 scheduled over the lunch hour, our Common Pleas Judges  
4 meet on administrative matters. I was just trying to  
5 determine how much longer you anticipated the direct  
6 examination going so that we may take a break at that  
7 point or we may take a break now, or we may take a  
8 break after the completion of the witness depending  
9 on --

10 MR. PORTER: I am at a position to break whenever  
11 the Court does, I do not want the Judges to miss the  
12 conference. My only concern is that we do need to get  
13 this -- I don't anticipate it's going to be a real long  
14 witness we are working around her schedule, she needs  
15 to be done by 4:00 today just because she has a  
16 clemency hearing in a death penalty case tomorrow, so  
17 if it would help the Court we are certainly willing to  
18 accommodate and break now.

19 JUDGE NASTOFF: Why don't we go ahead and break  
20 for that meeting then at this point in time. Would all  
21 counsel be able to resume at 1:00?

22 MR. EICHEL: Yes.

23 MS. COOK-REICH: Yes, Your Honor.

24 JUDGE NASTOFF: All right. Ms. Mausser, would you  
25 be able to be back at 1:00?

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1 THE WITNESS: Yes, I can.

2 JUDGE NASTOFF: Ma'am, I am going to indicate that  
3 since you are in the course of your testimony, I would  
4 ask that you not discuss your testimony with any other  
5 witnesses, and then when we come back, of course, we  
6 will remind you that you are still under oath at that  
7 point in time.

8 THE WITNESS: Thank you.

9 (Recess taken at this time.)

10 JUDGE NASTOFF: You may recall your witness. The  
11 record -- before we do that the record will reflect  
12 that the defendant is again present, Mr. Davis with his  
13 counsel, both Mr. Porter and Ms. Cook-Reich. State's  
14 representatives are present, as are all three members  
15 of the panel. You may recall Cynthia Mausser.

01:05PM

16 MR. PORTER: Thank you, Your Honor.

17 JUDGE NASTOFF: Before we pick up. Ms. Mausser, I  
18 want to remind you that you are still under oath from  
19 your testimony prior to our break.

20 THE WITNESS: Yes, thank you.

01:10PM

21 Q. (BY MR. PORTER) When we left off, Ms. Mausser, if  
22 I remember correctly I was asking you whether the parole board  
23 would treat certain factors either negatively, positively or  
24 neutrally regarding parole and I think I have two or three  
25 other factors to ask you about.

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1 A. Okay.

2 Q. If an individual was on parole at the time he  
3 committed the offense that he was appearing before the board,  
4 would the board view that as a negative, positive or neutral  
5 factor?

6 A. That would be a negative factor.

7 Q. If the individual had committed a similar offense  
8 prior to committing the similar offense to the offense that he  
9 was appearing before the board, would that be viewed as a  
10 negative, positive or neutral factor?

01:11PM

11 A. Most times I think it would be a negative factor.

12 Q. I am going to shift gears on you, Ms. Mausser.

13 A. Okay.

14 Q. You said you had been on the parole board since  
15 what year was it again, I'm sorry?

16 A. I have been a member since 2001. But with the  
17 board in some capacity since '94.

18 Q. What was -- what capacity did you serve with the  
19 board prior to 2001?

20 A. I was a hearing officer and I conducted revocation  
21 hearings.

01:12PM

22 Q. And for purposes of the Judges or the record,  
23 could you tell the Court what that entailed?

24 A. When an offender on either initially parole and  
25 then post-release control after Senate Bill 2 violated

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1 conditions of their release, and the field officers were  
2 seeking a return to prison, an administrative hearing had to  
3 be conducted and that is, I conducted the hearing and made the  
4 decision whether or not to return the person to prison.

5 Q. All right. Would that be the final decision or --  
6 would that be a final decision or a preliminary decision?

7 A. It was a final decision.

8 Q. So that would be different, for those of us who  
9 are old school, it would be an onsite hearing?

10 A. Yes, it is different than an onsite hearing.

01:12PM

11 Q. Since 2001, when you became a member of the parole  
12 board, do have an estimate of how many hearings you have sat  
13 on?

14 A. No, I don't.

15 Q. Are you able to approximate it?

16 A. Oh, gosh, no. Well, until I became chair in '05,  
17 I was, you know, my full-time job five days a week traveling  
18 to mostly the institutions in the northeast portion of the  
19 state. And any given institution you probably conducted  
20 between, oh, I would say six to eight hearings a day  
21 individually, so times five times 52, I guess would be my best  
22 estimation so, a lot. I said a lot.

01:13PM

23 Q. Did you sit on hearings involving all types of  
24 offenses?

25 A. Yes.

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1 Q. Did you -- would that include the offenses of  
2 murder and aggravated murder?

3 A. Yes.

4 Q. And just a little bit of background, how do the  
5 board members vote on those sort of things? Is there a  
6 procedure, do they use ballots?

7 A. In particular to aggravated murder and murder or  
8 just in general?

9 Q. Just in general first.

10 A. Well, the institutional hearing is generally  
11 conducted and if it isn't a case that requires a majority vote  
12 to be released, there is what we call a decision sheet that is  
13 filled out and the recommendation is -- now it is typewritten  
14 on there we use laptops and then that decision has to be  
15 reviewed. We have a quality assurance section that reviews it  
16 just to make sure that the guidelines were applied properly,  
17 and you know, calculations were done correctly. And then they  
18 ultimately have to be approved by the chair. And then in  
19 those cases, where there is a majority vote, when we conduct  
20 the central office board review, those closed meetings of the  
21 board where those cases are discussed, we have a board  
22 member's complete individual vote sheets with their written  
23 vote on it and then there is a record kept of the individual  
24 votes as well.

25 Q. And that is for --

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01:14PM

01:15PM



1           A. Not in terms of the rational, but just in terms of  
2 what the actual recommendation is either parole or  
3 continuance, generally.

4           Q. And you mentioned this previously, if the board --  
5 one of their options is to deny the parole, and then continue  
6 it; is that correct?

7           A. Right.

8           Q. And what options do they have with respect to  
9 continuing it?

10          A. You set a subsequent hearing date and we can only  
11 go ten years out. Or that is as far as we can set a date out,  
12 within ten years you have to again consider the person for  
13 release.

01:16PM

14          Q. Is that the same thing as what is known as a flop,  
15 for lack of a better --

16          A. I believe that is the slang term that is generally  
17 used in the institutions, yes.

18          Q. What factors does the board look at when they are  
19 determining how long to schedule the next hearing for?

20          A. The same factors that are considered in  
21 suitability, I think probably in the length of the  
22 continuance, the seriousness of the offense, probably factors  
23 most significantly into the length, and one of the other  
24 factors that is really important too is the sentence imposed  
25 by the Court. And we will see, you know -- under old law

01:17PM

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1 offenders became parole eligible much sooner than the actual  
2 sentence was imposed, so that weighs significantly into our  
3 determinations. So you may have a sentence of 150 years to  
4 300 years, but no, for those of us working in this, they  
5 became parole eligible much sooner than that, but that  
6 obviously sends us or is significant in what the sentencing  
7 judge was thinking about the offense when they imposed that  
8 sentence.

9 Q. Is that still a factor that you look at?

10 A. Yes.

01:18PM

11 Q. Is it just the raw sentence, the 150 to 300 or do  
12 you, in those cases where the Judge offers some rationale, do  
13 you also look at the rationale?

14 A. We look at -- if we have that information we  
15 consider it.

16 Q. In the time you have been on the parole board both  
17 as a member and as the chairman of the parole board, I believe  
18 you have testified that you have sat on cases involving  
19 sentences for aggravated murder?

20 A. Yes.

01:18PM

21 Q. In those cases that you have sat on, is it -- I'm  
22 sorry. Strike that. Let me rephrase my question. In those  
23 cases that you have sat on involving aggravated murder, how  
24 common is it that an individual receives parole on his first  
25 board hearing?

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1           A.    well, our -- the time served reports, which are  
2   what our department, their research section of our department  
3   publishes yearly, suggests or shows that the average amount of  
4   time served for an aggravated murder conviction right now is  
5   about 27 years.  So for those folks that we still see or we  
6   see as parole eligible under old law, you know, generally  
7   became parole eligible at I think it was between ten and  
8   fifteen years, so that would suggest that they generally do  
9   not get released at that first hearing.

10           Q.   Have you sat on a parole board hearing when an  
11   individual was convicted both of aggravated murder, and death  
12   penalty specifications and got a sentence of less than death?

01:20PM

13           A.   I'm sorry, can you repeat that?  I'm not sure I  
14   understand it.

15           Q.   It's probably because my question was  
16   inarticulate.  Have you sat on a parole board hearing when the  
17   individual was not only convicted of aggravated murder, but  
18   was convicted of death penalty or capital specifications, but  
19   the individual received a sentence of less than death?

20           A.   I don't believe so.

01:21PM

21           MR. PORTER:  May I have just a minute, please,  
22   Your Honor?  Thank you very much for the courtesy.  I  
23   have two questions left and I thank the Court for being  
24   patient with me.

25           Q.   (BY MR. PORTER) And I forgot the term already.

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1 You referred to some sort of report or something --

2 A. A decision sheet?

3 Q. No, I am not even good at phrasing my question  
4 there. You refer to when you are talking about people serving  
5 time for aggravated murder, and you said, you referred to a  
6 report or a document, report is probably the wrong term,  
7 document that reflects that they spend on the average 26 or 27  
8 years, what is that document again, please?

9 A. It is -- they are yearly reports that are  
10 published by the Department of Rehabilitation and Corrections  
11 research section and they are called time served reports.

01:22PM

12 Q. And are those public reports?

13 A. Yes, they are on the website.

14 Q. Do those reflect just the past year or do they  
15 reflect --

16 A. No, I think right now they are into calendar year  
17 '08.

18 Q. And if you are aware since you were able to cite  
19 to the figure today, has that figure changed dramatically over  
20 the seven years have been on the parole board?

01:23PM

21 A. It is increased by about a year over I think from  
22 the calendar year -- I can't say for sure, but there was about  
23 a year increase between reports.

24 Q. Between 2001 and 2008?

25 A. No, I think it was between 2000 -- whatever is

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1 currently on there, and I could be mistaken that it is  
2 calendar year 2008. It could be 2007 so I am not for certain.  
3 But between the most recent report and I believe the previous  
4 year to that I believe there has been an increase in a year.

5 Q. And I thought of a related question so I'm going  
6 to ask you a couple more than what I promised.

7 A. Okay.

8 Q. Is -- you talked about sitting on aggravated  
9 murder cases, and as you have educated me today, an aggravated  
10 murder case there is always going to be a full board case, am  
11 I correct in that?

01:24PM

12 A. I wouldn't use the term full board because when  
13 you say full board I think of the current process where we  
14 have the open hearing, and that only occurs when one, we are  
15 proposing parole, so the person has actually gotten a majority  
16 vote, for, potentially for release, and then there is an  
17 objection to that, through the office of victim services on  
18 behalf of the victim to hold that hearing. All aggravated  
19 murder convictions in order to be paroled, need a majority  
20 vote, so all of those have to be discussed and voted on by a  
21 majority, at least the majority of the members in order to get  
22 that vote. And we call that now Central Office Board Review.  
23 It used to before 1996, it used to be called full board  
24 reviews.

01:24PM

25 Q. So because of that rule where everyone has to vote

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1 or at least they have to get a majority, then you have at  
2 least been in the position to vote on all aggravated murder  
3 cases for parole purposes since you have been on the board  
4 since 2001, am I correct?

5 A. That would be accurate, yes, those that are parole  
6 eligible.

7 Q. And there would be no reason if they weren't  
8 parole eligible for you to --

9 A. No. Correct.

10 Q. I am now down to what I think is my final  
11 question.

12 A. Okay.

13 Q. What I am going to do is ask you a hypothetical,  
14 and please let me get through all of the facts before you  
15 answer it if you can, in fact, answer it, okay?

16 A. Okay.

17 Q. Assuming that an individual has been previously  
18 convicted of second degree murder, and that individual is  
19 released, further assuming -- let me step back for a minute  
20 and add an additional fact -- convicted of second degree  
21 murder and I understand that no longer exists, was convicted  
22 of killing his wife, and assuming that individual is paroled  
23 after about a decade, and assuming that individual, while  
24 still on parole, commits a second murder, and this time is  
25 convicted of aggravated murder with death penalty, or capital

01:25PM

01:26PM

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1 specifications, however you refer to it as, and that  
2 individual is sentenced to death, and at some point that  
3 individual is awarded a new sentencing hearing, with respect  
4 to just the second murder and at the new sentencing hearing he  
5 is awarded a sentence of 30 to life, based upon your  
6 experience, training and work on the parole board, do you have  
7 an opinion of whether that individual is likely to be paroled  
8 in the future?

9 A. Ever?

10 Q. Ever?

01:28PM

11 A. I think that person would have to -- would likely  
12 spend a large portion of the remainder of their life in  
13 prison.

14 Q. Do you have an opinion of whether that individual  
15 would be likely to be granted parole in his first hearing?

16 A. I think that would be unlikely.

17 Q. And I just think -- I have one additional question  
18 and it is just background, I am sorry, Your Honors, I know I  
19 keep saying --

20 JUDGE NASTOFF: You might want to just stop saying  
21 that.

01:28PM

22 Q. (BY MR. PORTER) In this case, Von had his parole  
23 revoked after he committed the second murder. How does the  
24 parole board -- how will the parole board, assuming -- this  
25 all assumes the Court gives a sentence less than death, treat

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1 the two murders? Will they be treated separately for purposes  
2 of parole, or will they be grouped together and you have a  
3 long look like my question is a little unclear?

4 A. No, I think I understand what you are saying. In  
5 terms of when they become then parole eligible on that new  
6 conviction, the --

7 Q. If?

8 A. Recommitment on the new conviction, the prior  
9 murder would be considered as part of the criminal history but  
10 factored into the decision making nonetheless.

01:30PM

11 Q. This wouldn't be a situation of occasionally --  
12 it's my understanding when someone violates the parole they  
13 have to, like, because they are convicted of the second  
14 offense that they have to serve the remainder or at least a  
15 portion of their first sentence before they start serving the  
16 second sentence. That would not be a situation in this case;  
17 is that correct? And I could have a misunderstanding of the  
18 process to begin with.

19 A. Yeah. No, I think -- I'm not certain, but with  
20 someone who is recommitted, paroled on a life sentence and  
21 recommitted on a new life sentence you begin the new sentence  
22 and then become parole eligible -- it is hard to aggregate  
23 life sentences because they are the maximum sentences life  
24 regardless.

01:30PM

25 Q. So this wouldn't be --

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1           A.    The scenario that are you suggesting I think it is  
2 actually the opposite.

3           Q.    All right.

4           MR. PORTER: I believe I don't have any more  
5 questions unless my co-counsel sees otherwise. Thank  
6 you very much for your patience, Your Honor.

7           JUDGE NASTOFF: Mr. Oster or Mr. Eichel?

8                   CROSS-EXAMINATION

9           BY MR. OSTER:

10           Q.    Good afternoon, Ms. Mausser. Michael Oster, I am  
11 assistant prosecuting attorney for the state of Ohio. I  
12 believe we spoke on the phone the other day.

01:31PM

13           A.    Yes.

14           Q.    Now, before you began working at the parole board,  
15 you were assistant public defender working with parolees; is  
16 that correct?

17           A.    Right.

18           Q.    And you stated that your current position is an  
19 appointment. How long are you appointed for?

20           A.    At the pleasure of the director.

01:32PM

21           Q.    Okay. So at any time, you could get a phone call  
22 currently saying, sorry, you are no longer on the parole  
23 board; is that correct?

24           A.    Yes.

25           Q.    Okay. And is that true for -- currently there are

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1 seven members, but statutorily there could be twelve, any of  
2 those members could receive that same phone call as I speak  
3 right now, correct?

4 A. Correct.

5 Q. And your title as the chair of the parole board,  
6 you don't necessarily get, and I am going to use a bad term of  
7 art, probably, but you don't have any special powers at the  
8 hearings or during a vote or anything like that, do you?

9 A. My vote doesn't weigh any -- isn't weighted any  
10 heavier than any other board member's vote.

01:32PM

11 Q. And you don't get to be the first one to vote all  
12 the time or anything like that, correct?

13 A. No.

14 Q. And the title, I think you described it before is  
15 it is more of as an overall administration of the board; is  
16 that correct?

17 A. Correct.

18 Q. And in fact, when a case is to be presented, there  
19 is a primary panel member that is tasked with the  
20 responsibility of actually putting on the presentation to the  
21 board; is that correct?

01:33PM

22 A. That's correct.

23 Q. And that is not always you, correct?

24 A. Most of the time it is not me.

25 Q. Most of the time it is not you?

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1 A. Right.

2 Q. So it would be one of the other currently six  
3 members of the parole board would be that primary panel  
4 member?

5 A. That's correct.

6 Q. Okay. And the questions were asked of you earlier  
7 and I guess for clarification let me see if maybe this  
8 phraseology either makes it more confusing or less, but if  
9 someone becomes parole eligible on a first offense, then they  
10 have a second offense, does it matter to the parole board  
11 whether that offense is stated as being served consecutively  
12 or concurrently by the trial judge at that time?

01:33PM

13 A. It is a factor that we would consider, but we  
14 wouldn't see that person until they become parole eligible  
15 whether or not it is run consecutively or concurrently, but  
16 the fact that that was part of the sentence, that that is what  
17 the sentencing judge chose to do, you know, is a  
18 consideration, it is a factor that we consider.

19 Q. It is a consideration in one of the multitude of  
20 what we heard today in which the board has wide discretion?

01:34PM

21 A. Yes.

22 Q. And it is every, at a minimum, every ten years  
23 that someone becomes eligible for a parole hearing; is that  
24 accurately stated?

25 A. After first eligibility.

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1 Q. After first eligibility it is at least within ten  
2 years?

3 A. Correct.

4 Q. Now, could that be one year they could have a new  
5 hearing?

6 A. Yes.

7 Q. Two years?

8 A. Yes.

9 Q. So it could be every year after the first hearing,  
10 correct?

01:34PM

11 A. Yes.

12 Q. Okay. The defendant in this case, Von Clark  
13 Davis, you don't know him at all, do you?

14 A. No, I don't.

15 Q. Never spoken to him, correct?

16 A. No.

17 Q. You have reviewed a file on him, though, haven't  
18 you?

19 A. Yes.

20 Q. And is that a parole board file that you have  
21 reviewed on him?

01:35PM

22 A. I reviewed his, I think it was the initial journal  
23 entry on the second degree murder, and then there were some  
24 violation reports that the initial parole officer or the  
25 initial -- the first parole officer had written after the

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1 current offense was committed.

2 Q. So in your possession you had the second degree  
3 murder conviction and some reports from the original parole  
4 officer, did you say violations?

5 A. Right.

6 Q. Okay. And is that all you've reviewed?

7 A. No.

8 Q. What else have you reviewed?

9 A. I reviewed -- Mr. Porter sent me his institutional  
10 summary report, and the two Supreme Court decisions that  
11 overturned the previous death sentence.

01:36PM

12 Q. Okay.

13 A. No, I am sorry, one overturned and one affirmed,  
14 the 1988 and the 1992 decisions, and I reviewed my previous  
15 testimony that Mr. Porter sent me in that packet.

16 Q. Your previous testimony from this case?

17 A. Not from this case from a different death penalty  
18 case.

19 Q. Okay. But none of those materials you've reviewed  
20 would be the entire packet or a lot of the things that we have  
21 talked about here today that the parole board would actually  
22 review come the time of a hearing, correct?

01:36PM

23 A. Correct.

24 Q. You don't have your 24 risk factors, you don't  
25 have a lot of the sheets, the reports, that would be --

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1 wouldn't you consider that to be a very small amount of  
2 information as opposed to what you would have when you go to  
3 conduct a hearing?

4 A. Yes.

5 Q. And you said statutorily that the board can  
6 consist of anywhere between seven and twelve members; is that  
7 correct?

8 A. Up to twelve is what it said statutorily.

9 Q. Up to twelve, is there a minimum statutorily?

10 A. Well, I think that is kind of debatable because  
11 our -- in the full board statute it requires seven board -- it  
12 actually says seven board members have to conduct the full  
13 board hearings, so I would say that, you know, you can imply  
14 that seven are at least required to conduct those.

01:37PM

15 Q. Okay. And in a situation where a person is facing  
16 a life sentence, there has to be a majority of those members  
17 that vote in favor of parole; is that correct?

18 A. Correct.

19 Q. Currently as the board stands there has to be at  
20 least four members that vote for parole of someone with a life  
21 sentence, correct?

01:37PM

22 A. That's correct.

23 Q. And excuse me if I misunderstood and some of the  
24 terminologies were a little difficult, but in doing that, not  
25 all seven members of the board have to be present though to

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1 have that vote; is that correct?

2 A. Right.

3 Q. Could that vote be without your presence?

4 A. Yes.

5 Q. So you would not even have to be included as one  
6 of the four members who would vote on that issue?

7 A. Correct.

8 Q. You could be one of the three that was either  
9 excluded entirely?

10 A. Yes.

01:38PM

11 Q. And per statute as we spoke of, you know, you  
12 could get a phone call right now, I don't wish that on you in  
13 a bad economy, obviously.

14 A. Thank you.

15 Q. You could get a phone call right now, five other  
16 board members could be appointed today, is that possible, or  
17 in the near future?

18 A. Yes. Yes.

19 Q. Okay. Which would then mean that there would have  
20 to be a total of seven to vote for that parole eligibility?

01:39PM

21 A. That's correct.

22 Q. And again, you wouldn't even have to have taken  
23 part in that?

24 A. Right.

25 Q. And you can't, as you sit here today, tell us how

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1 | any other member of the board would ever vote on a case, could  
2 | you?

3 | A. No.

4 | Q. And it would actually be a bit, I don't know if  
5 | unethical is the word, improper for you to even assume you  
6 | could say how a certain person would vote, correct?

7 | A. Well, after you work with people for a certain  
8 | amount of time, you get a sense of how they may decide that --

9 | Q. You could not --

10 | A. But I couldn't say for certainty that someone -- I  
11 | think I could form an opinion and --

01:39PM

12 | Q. Could you form that opinion without having all of  
13 | that information in front of you to see the risk factors, all  
14 | of the things we have said you just had a very small portion,  
15 | without all of the other things could you form that opinion?

16 | A. No.

17 | Q. And as you go into a vote on a case, you don't  
18 | actually know for certain how any of the members is going to  
19 | vote, correct?

20 | A. No, I don't.

01:40PM

21 | Q. And I think we -- you said this before but I want  
22 | to make sure, your vote as the chair is just a single vote?

23 | A. That's correct.

24 | Q. And without all of the information that we have  
25 | spoke about, phrase it in terms of other members of the board,

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1 you, yourself, don't know how you would vote in any future  
2 case without all of the information, correct?

3 A. That's correct.

4 Q. And when you were discussing, I believe it was  
5 termed in terms of positive, negative, neutral, questions do  
6 you understand what I am saying?

7 A. Yes.

8 Q. And Judge Pater had a couple of follow-ups to  
9 that?

10 A. Yes.

01:40PM

11 Q. As you are saying tends to, or I think another  
12 time you said, most times, and I understand you have a law  
13 degree, so I understand as lawyers we don't like to be pinned  
14 in, but essentially, is it what you are trying to say that you  
15 can't know something for sure without all that information,  
16 those files being properly presented to you, so you have to in  
17 some way take a step back from what your true position would  
18 be because it would be improper; is that correct?

19 A. I think that is fair to say.

20 Q. Okay.

01:41PM

21 A. Yes.

22 Q. And so for all of the different hypotheticals, the  
23 four, I think four of the positive, negative, neutral, the  
24 final hypothetical that was asked to you, you are trying to  
25 give somewhat of a speculative answer based on a hypothetical

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1 but in no way would relate to in the real world what you would  
2 actually have in front of you in giving that opinion, correct?

3 A. Correct, and I wouldn't make a predetermination of  
4 someone who is not yet in front of, parole eligible.

5 Q. Okay. And one of the things by the statute that  
6 you said, I believe you are supposed to consider is the  
7 opinion of Judges or prosecutors or victims; is that correct?

8 A. Yes.

9 Q. But you don't necessarily have to give that a lot  
10 of weight, do you?

01:42PM

11 A. None of the factors that we consider are we  
12 required to give a certain amount of weight to, that is all  
13 within the discretion of the individual board members how much  
14 weight any of us want to give to any particular factor.

15 Q. Okay. So again, that is something that could vary  
16 across the spectrum by different board members?

17 A. That's correct.

18 Q. And board members sometimes will look at  
19 statements from prosecutors and view that a prosecutor doesn't  
20 actually see the person the way you see them now, because you  
21 view a prosecutor as you think they see them more just at a  
22 time of conviction and we never see a change, and so sometimes  
23 prosecutor's opinion can be discounted a bit, would you agree  
24 with that?

01:42PM

25 A. I don't know that it is discounted, but I think

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1 that we look at it in the context of generally the information  
2 that we receive from prosecutors is that which occurred at  
3 trial.

4 Q. And, in fact, you stated you think oftentimes  
5 prosecutors see the person that they did at the time of the  
6 conviction, they are not, they don't see -- I'm sorry. They  
7 don't have the benefit of the information we have many years  
8 after the fact, you have actually said that before, correct?

9 A. I may. I don't recall saying that, but I may  
10 have.

01:43PM

11 Q. Do you remember saying it to NBC News 4, April 24  
12 of this year?

13 A. Probably. I mean -- April 24 I recall being  
14 interviewed, I think that...

15 Q. Okay. And this same -- I can understand, but this  
16 same not having the benefit of information, that would also  
17 apply to the original trial judge as well, correct?

18 A. Yes.

19 Q. And it would apply to the victims of the crime,  
20 correct?

01:44PM

21 A. Absolutely.

22 Q. So all of them in coming before the board, in your  
23 mind -- I'm sorry. All of them in coming in front of the  
24 board, they -- I'm sorry. Are they allowed to give testimony  
25 to the board or statement to the board?

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1 A. Yes.

2 Q. Okay. So, all of them as they come before the  
3 board to give their testimony, the board has much more  
4 information about the person and the board believes themselves  
5 to be in a better position to view a case than a prosecutor,  
6 judge or victim; is that fair?

7 A. I don't know that we feel like we are in a better  
8 position. And it is not just about the information that we  
9 have about the defendant. There is oftentimes that, you know,  
10 typically like in child sexual abuse cases, you see continued  
11 victimization over the years well into adulthood how people  
12 have suffered, that it could not have been known at the time  
13 of sentencing, so it is not just information about -- positive  
14 information about the offender. It is just information about  
15 the effect of the offense as well to all parties involved,  
16 that just because of time passing, we have the ability to  
17 review and consider.

01:44PM

18 Q. And so then it would be up to the discretion of  
19 each individual member how much weight to give any of those  
20 testimonial offerings, correct?

01:45PM

21 A. Correct.

22 Q. And as you sit here today, you cannot say how you  
23 would vote if the defendant here would ever become eligible  
24 for parole, can you?

25 A. No, I can't.

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1 Q. And as you sit here today, you cannot say with any  
2 level of certainty, how the entire board would vote if this  
3 defendant ever became eligible for parole, could you?

4 A. No, I cannot.

5 MR. OSTER: If I could have just one moment, Your  
6 Honor.

7 JUDGE NASTOFF: You may.

8 MR. OSTER: I would like to thank you for your  
9 time, Ms. Mausser. I don't have any further questions.

10 JUDGE NASTOFF: See if there is any redirect. Any  
11 redirect examination?

12 MR. PORTER: Thank you. We do not have any  
13 redirect.

14 THE WITNESS: Can I correct an answer I gave  
15 earlier? I think it might be unusual --

16 JUDGE SPAETH: Unsolicited.

17 JUDGE NASTOFF: Yeah, there is no question before  
18 you at this time.

19 THE WITNESS: Okay.

20 JUDGE NASTOFF: All right. May she be released  
21 permanently from any subpoenas or subject to recall?

22 MR. PORTER: She can be released from our  
23 subpoena, Your Honor.

24 JUDGE NASTOFF: Thank you, Ms. Mausser. Your  
25 testimony is complete and you are released from your

01:46PM

01:47PM

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1 subpoena and you can return to your duties.

2 THE WITNESS: Thank you.

3 MS. COOK-REICH: Last witness will be fairly short  
4 and he is outside.

5 JUDGE NASTOFF: Last witness or last witness  
6 for --

7 MS. COOK-REICH: For the day.

8 JUDGE NASTOFF: Okay.

9 JEROME STINEMAN

10 having been first duly sworn, was examined and testified under  
11 oath as follows:

01:47PM

12 DIRECT EXAMINATION

13 BY MS. COOK-REICH:

14 Q. Can you state your name for the record, please?

15 A. Jerome Stineman.

16 Q. Mr. Stineman, how are you employed?

17 A. I am self-employed, I am an attorney practicing in  
18 the State of Ohio.

19 Q. And what is your business address?

20 A. 2101 Grandin Road, Suite 601, Cincinnati, Ohio.

01:48PM

21 Q. Have you had occasion to come to know the man  
22 seated over here to the right in the tan shirt?

23 A. Yes, I know Von Davis.

24 Q. Okay. How do you know Von Davis?

25 A. I met him a number of years ago, at Southern Ohio

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1 Correctional Facility in Lucasville.

2 Q. And in what capacity did you come to know Von?

3 A. I was a volunteer in the AA program that was had  
4 in the general population for a number of years. And some of  
5 the inmates who were members of what was called the survivor  
6 group of Alcoholics Anonymous wanted to take the message of  
7 Alcoholics Anonymous to other alcoholics and they asked for  
8 permission to conduct a meeting on death row and as an outside  
9 visitor, volunteer as they called us, but as a member of  
10 Alcoholics Anonymous, I also participated in those meetings  
11 that Mr. Davis attended.

01:49PM

12 Q. And do you remember about what year you came to  
13 know Von?

14 A. I have searched my memory, it had to be starting  
15 some place around late 1989 or beginning of 1990. Somewhere  
16 in there.

17 Q. And these were conducted at Lucasville?

18 A. Yes, we would actually, myself and sometimes two  
19 or three other volunteers, as we were called, would meet up  
20 with two inmates and we conducted back to the death row, it  
21 was L block. I can't remember. We go back into the prison to  
22 the block where death row was, and into their general room or  
23 day room whatever, where the meeting would be conducted.

01:50PM

24 Q. Okay. And was there any special standards that  
25 you are aware of that a death row inmate would be able to

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1 participate in these AA groups?

2 A. They had to be in the highest classification, I  
3 believe it was called A classification having merited the  
4 right to whatever benefits were available for good behavior,  
5 plus a willingness and desire to participate.

6 Q. And could you give an estimation of how many times  
7 that you met with Von for these AA meetings?

8 A. I am pretty sure that Von was there from the  
9 beginning. The meetings went on until about four days before  
10 the riots in April of '93. And they were weekly except for  
11 unless it was, like, Thanksgiving, Christmas weeks, and I know  
12 as long as there was a meeting, Von was there. I have to say  
13 there were probably 40, maybe like 48 meetings a year. There  
14 were sometimes, you know, for holidays when meetings didn't  
15 occur.

01:51PM

16 Q. So for, from at least '90 I think you said, until  
17 the time right before the riots occurred, which would be, you  
18 said '93?

19 A. It was April 11 of '93, I was there four days  
20 before that for a meeting on death row.

01:51PM

21 Q. Forty-eight meetings a year you saw Von each of  
22 those occasions?

23 A. I believe he was always there unless he was sick,  
24 but I don't, you know, my memory is not that good.

25 Q. Did you, never having been to an AA meeting, I am

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1 assuming you discussed usage of alcohol and how it affects  
2 your life?

3 A. That meeting was specifically where we read from  
4 the book Alcoholics Anonymous and discussed what we read and  
5 how it related to our individual lives and talked about  
6 recovery from alcoholism.

7 Q. Okay. Did Von Clark Davis ever discuss his  
8 alcohol use?

9 MR. EICHEL: Object. Hearsay.

10 (Judges confer off the record.)

01:52 PM

11 JUDGE NASTOFF: Establish the relevance of the  
12 topic and we will decide how we want to apply the  
13 hearsay rules based on the proposed relevance.

14 MS. COOK-REICH: Dr. Smith will talk about this as  
15 part of the social history also in addition to it, but  
16 we had Mr. Stineman here also.

17 JUDGE NASTOFF: Overruled.

18 Q. (BY MS. COOK-REICH) Did he ever discuss his  
19 alcohol use?

20 A. I am sure on many occasions he did. Specifically,  
21 I came to understand that crime for which he was currently  
22 incarcerated had to do with an event which took place when he  
23 was under the influence of alcohol to the extent that he was  
24 in a blackout being, based on my experience and what he talked  
25 about, was that he was able to function without recognizing

01:53 PM

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1     what he was doing at the time.

2             Q.    Okay. Did you have contact with von Clark Davis  
3     after he -- after the death row moved from Lucasville to  
4     Mansfield?

5             A.    Only by mail and we corresponded, we have  
6     continued to correspond probably three or four times a year on  
7     average.

8             Q.    And you have continued that to this day?

9             A.    Yes.

10            Q.    How many members of -- if you recall, because it  
11     has been a while -- from death row would attend these  
12     meetings?

01:54PM

13            A.    I think it may have been limited to ten. I don't  
14     think there was -- that seems to be what I recall.

15            MS. COOK-REICH: Nothing further, thank you. One  
16     of the gentlemen here might have a question for you.

17            JUDGE NASTOFF: Cross-examination?

18            MR. OSTER: If we could have just a minute, Your  
19     Honor.

20            JUDGE NASTOFF: You may.

01:55PM

21            MR. OSTER: I'm sorry, Your Honor, just one more  
22     second.

23            JUDGE NASTOFF: That's fine. You may proceed with  
24     cross.

25                               CROSS-EXAMINATION

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1 BY MR. OSTER:

2 Q. My name is Michael Oster. I'm an assistant  
3 prosecutor for the State of Ohio. I want to ask you a couple  
4 questions. Mr. Stineman, would it surprise you to know that a  
5 lot of his entry records Mr. Davis said he had no problem with  
6 alcohol, was not a drinker?

7 A. Probably wouldn't surprise me. I find that many  
8 people who drink a lot consider they don't drink -- they drink  
9 very little or they don't seem to think they drink at all.

10 Q. And your testimony was that Mr. Davis said to you,  
11 he didn't remember the events because he was in an alcoholic  
12 blackout?

01:56PM

13 A. Well, I am not sure. It's been a long time --

14 Q. That was your testimony --

15 A. I said to my recollection that is what I  
16 understood had occurred. I am not sure how he said that or  
17 exactly -- having met with him a number of times and discussed  
18 various things such as -- effects of alcohol, that was my  
19 understanding.

20 Q. That was your understanding. Okay. Thank you.  
21 So if he said he only had a little bit of beer on the night in  
22 question, that would be inconsistent with what you remember  
23 him telling you, correct?

01:57PM

24 A. Well, my personal experience in having talked to  
25 other alcoholics is that they --

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1 Q. Please, sir --

2 A. -- the number of drinks is not --

3 Q. Please just answer my question.

4 A. Okay.

5 Q. If he had said on the night in question he only  
6 had a little bit of beer, that would be inconsistent with your  
7 recollection of what he had told you about this blackout type  
8 nature, correct?

9 A. Not necessarily. He could have a blackout from a  
10 very small amount of alcohol.

01:57PM

11 Q. Are you a doctor to be able to make that  
12 statement, sir?

13 A. I am talking about it from my own experience. I  
14 drank for 26 years, I have been sober for 24.

15 Q. Would that or would that not be inconsistent for a  
16 person to blackout based on a little bit of beer?

17 A. Maybe unusual. I wouldn't say inconsistent.

18 MR. OSTER: If I could have just a minute, Your  
19 Honor.

20 Q. (BY MR. OSTER) Mr. Stineman, if a person said  
21 they had been driving a car, that is not consistent with a  
22 blackout statement, is it?

01:58PM

23 A. Driving a car while in a blackout? That is not  
24 inconsistent?

25 Q. That is not -- that wouldn't be consistent being

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1 | able to do those two things at one time, is it?

2 |       A.    The things I can tell you which would be hearsay,  
3 | you wouldn't believe what people have done in blackouts, but  
4 | in my own experience I have driven numerous times in  
5 | blackouts. So I would have to say it is possible, yes.

6 |       Q.    And you wouldn't expect someone who is in a  
7 | blackout to be walking around, talking to people, eating food,  
8 | driving, and capable of cognitive reasoning, would you?

9 |       A.    The actions are consistent with being in a  
10 | blackout. What do you mean by cognitive reasoning? I don't  
11 | know --

01:59PM

12 |       Q.    You are basing this solely on your experience,  
13 | correct? You have no expertise whatsoever in the subject,  
14 | correct?

15 |       A.    Personal experience plus instances of other people  
16 | who I have encountered in blackouts --

17 |       Q.    I prefer if you answer my question, sir.

18 |       A.    Repeat the question, I'm sorry.

19 |       Q.    My question was, are you basing this on your  
20 | experience, correct?

01:59PM

21 |       A.    Yes, that's correct.

22 |       Q.    And you don't have a doctorate in dealing with  
23 | blood alcohol levels, you don't have toxicology experience as  
24 | far as education, do you?

25 |       A.    Only what I have done through defense, criminal

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1 defense work.

2 Q. So that is a no; is that correct, sir?

3 A. The answer would be I am not trained in that, no,  
4 I'm not.

5 Q. But you are trained in the art of  
6 cross-examination as a defense attorney, correct?

7 A. I was a prosecutor once. I have been a defense  
8 attorney, yeah.

9 MR. OSTER: One moment, please, Your Honor. We  
10 have no further questions.

02:00PM

11 The Court: Any redirect?

12 MS. COOK-REICH: No, Your Honor, thank you.

13 JUDGE NASTOFF: All right. May this witness be  
14 permanently excused?

15 MS. COOK-REICH: Yes.

16 JUDGE NASTOFF: Sir, you are released from your  
17 subpoena and can go about your business. Thank you.

18 THE WITNESS: Thank you.

19 MS. COOK-REICH: That concludes our witnesses for  
20 today, Your Honor. I wasn't able to get the third one  
21 to come today.

02:00PM

22 JUDGE NASTOFF: All right. For planning purposes,  
23 I believe that yesterday you had indicated that you  
24 thought you would have four witnesses on Thursday and  
25 that is what you are indicating you still believe --

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1 MS. COOK-REICH: Mr. Stineman was able to come  
2 today. We have asked Mr. Lee who we had here yesterday  
3 to come back tomorrow just in case we needed him after  
4 Dr. Smith. We have two short witnesses. And Dr. Smith  
5 -- we may have to call one of those short witnesses  
6 after Dr. Smith. He is traveling from Mansfield. That  
7 is quite a distance.

8 JUDGE NASTOFF: You lost me on the math. Three?

9 MS. COOK-REICH: Three.

10 JUDGE NASTOFF: Okay. And I believe that  
11 yesterday we had indicated that we would begin at 10:00  
12 so you will be able to have witnesses here ready to  
13 proceed at 10:00?

02:01PM

14 MS. COOK-REICH: Yes, we will.

15 JUDGE NASTOFF: All right. And again, I'm not  
16 asking the State to divulge any national security  
17 secrets or anything of that nature, but based on what  
18 we have heard to this point, do you have an estimate  
19 for our planning purposes as to the length of any  
20 rebuttal that you may be presenting?

02:01PM

21 MR. OSTER: I don't know if we can say without  
22 hearing some of the testimony tomorrow.

23 JUDGE NASTOFF: I said just based on what we have  
24 so far.

25 MR. OSTER: Certainly is a possibility. We would

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1 attempt to put on some rebuttal in the case. I don't  
2 -- right now feet to the fire, I wouldn't anticipate it  
3 being extensive.

4 JUDGE NASTOFF: All right. And if so, you  
5 anticipating being able to go forward with those  
6 witnesses tomorrow as well if that becomes relevant?

7 MR. OSTER: Yes, Your Honor.

8 JUDGE NASTOFF: All right. Do the Judges have any  
9 questions administrative or otherwise?

10 JUDGE PATER: No.

02:02PM

11 JUDGE SPAETH: No.

12 MR. OSTER: I guess the only question in preparing  
13 tonight would be based upon what has been said, I guess  
14 again, we are forecasting to try to close tomorrow?

15 JUDGE NASTOFF: It sounds to me like the evidence  
16 very well may be closed tomorrow. I don't know on the  
17 time, but I would anticipate that you should be in a  
18 position to -- we will try to, if we're able to, to  
19 give you some time to collect your thoughts before you  
20 go into close, but I would have, I would certainly have  
21 your thoughts organized to the extent that you can,  
22 before you come here tomorrow.

02:03PM

23 MR. OSTER: Thank you, Your Honor.

24 MS. COOK-REICH: Thank you, Your Honor.

25 JUDGE NASTOFF: All right. So if there is nothing

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1 further then at this time, we will stand in recess  
2 until 10:00 a.m. tomorrow morning at which time we will  
3 pick up with the rest of the defense's mitigation case.  
4 If there is nothing further, we are in recess.

5 (Proceeding concluded to be reconvened the  
6 following morning Thursday, September 10, 2009 at 10:00  
7 a.m.)  
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1 STATE OF OHIO )  
2 ) SS. REPORTER'S CERTIFICATE  
3 COUNTY OF BUTLER )

4 I, JILL M. CUTTER, RPR, an Official Court Reporter  
5 and Notary Public within the State of Ohio do hereby certify  
6 that the foregoing proceedings were taken in stenotype by me  
7 at the time and place herein set forth and thereafter reduced  
8 to typewritten form;

9 That the foregoing 201 pages constitutes a true  
10 and accurate transcript of the proceedings held, all done to  
11 the best of my skill and ability.

12 I further certify that I am not related to any of  
13 the parties hereto, nor am I in any way interested in the  
14 result of the action hereof.

15 IN WITNESS WHEREOF, I have hereunto set my hand at  
16 Hamilton, Ohio, this 22 day of December, 2009.

17  
18  
19   
20 JILL M. CUTTER RPR  
21 Official Court Reporter  
22 Butler County Common Pleas  
23 Hamilton, Ohio 45011  
24  
25

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